153 US 523

SOCIATION
PHILADELPHIA.

RECORD, CASE No. 14,287.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 263.

J. FENTON SEYMOUR, PLAINTIFF IN ERROR,

vs.

THE SLIDE AND SPUR GOLD MINES (LIMITED).

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED OCTOBER 15, 1890.

RECORD, CASE No. 14,287.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM NO., 263.

J. FENTON SEYMOUR, PLAINTIFF IN ERROR,

vs.

THE SLIDE AND SPUR GOLD MINES (LIMITED).

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

INDEX.

	Original.	Print.
Caption	1	1
Complaint	1	1
Summons	3	2
Proof of service	5	3
Order denying motion to quash summons	6	4
Demurrer to complaint	6	4
Order overruling demurrer to complaint	8	5
Answer	8	6
Replication	22	16
Order: Trial, finding for plaintiff, judgment	32	22
Order denying motion for new trial	34	23
Order vacating judgment and granting new trial	35	24
Order: Trial, verdict	35	24
Order denying motion for new trial	36	25
Judgment	37	25
Order fixing amount of supersedeas bond at $5,000	38	26

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 2, 1893.

	Original.	Print.
Bill of exceptions	39	27
Answer of defendant	39	28
Statute of Colorado	48	37
Deposition of J. Fenton Seymour	49	38
Exhibit 3—Heads of agreement signed by Col. Seymour	54	45
Instructions given	55	46
Verdict	55	46
Motion for new trial	56	46
Judge's certificate	56	47
Bond on writ of error	57	48
Assignment of errors	59	49
Writ of error	62	50
Return on writ of error	63	51
Citation	65	52
Acceptance of service of citation	66	52
Clerk's certificate	67	53

1 Pleas in the circuit court of the United States for the district of Colorado, sitting at Denver.

Be it remembered that heretofore and on, to wit, the 18th day of October, A. D. 1889, came the Slide & Spur Gold Mines (Limited), a corporation, by L. S. Dixon, its attorney, and filed in said court its complaint and sued out of and under the seal of said court a writ of summons against J. Fenton Seymour; and the said complaint is in words and figures as follows, to wit:

Complaint.

UNITED STATES OF AMERICA,
District of Colorado, } *ss:*

In the Circuit Court of the United States within and for the District of Colorado.

THE SLIDE & SPUR GOLD MINES (LIMITED), a Corporation, Plaintiff,
vs.
J. FENTON SEYMOUR, Defendant. } Complaint.

The plaintiff, complaining of the defendant, alleges that said plaintiff is a corporation formed, organized, and existing under and by virtue of the laws of Great Brit*ian* and is a citizen and subject of Great Brit*ian*, and that said defendant is a resident of the county of Arapahoe and State of Colorado and is a citizen of said State of Colorado.

That the said plaintiff is seized in fee of the following-described real property and premises, situate in Gold Hill mining district, in the county of Boulder and State of Colorado, to wit: The Slide lode or mine, being fifteen hundred feet in length and one hundred and fifty feet in width, and also the Spur lode or mine,
2 being thirteen hundred feet in length and one hundred and fifty feet in width, together with all shafts, levels, and other workings upon and connected with said lodes or mines; also the shaft and engine house, the ore-house and blacksmith shop, and all other buildings and improvements thereon; also of lots numbered seven (7) and eight (8), in block numbered seven (7), in the town of Gold Hill, in said county of Boulder and State of Colorado, together with all buildings and improvements thereon.

That said defendant wrongfully ousted the said plaintiff from said above-described premises and wrongfully withholds the said premises from the said plaintiff.

That the said plaintiff is entitled to the possession of said above-described premises.

That the property in controversy herein is of a value of more than ten thousand dollars.

Wherefore plaintiff prays judgment against said defendant for the possession of said above-described premises and for the sum of five thousand dollars, the plaintiff's damages, claimed by reason of the said ouster and detention, together with its costs, and for such other and further relief as to the court may seem proper.

L. S. DIXON,
Attorney for Plaintiff.

STATE OF COLORADO, }
County of Arapahoe, } *ss:*

George W. Hutchinson, being first duly sworn, says that he is the agent of the above-named plaintiff, and as such is authorized
3 to make this affidavit for and in its behalf; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true; that the facts in the said complaint are within his own knowledge as such agent, and for that reason he makes this affidavit, and for the further reason that the principal officers of said plaintiff corporation are absent from the United States, to wit, in the city of London, England.

GEORGE W. HUTCHINSON.

Subscribed and sworn to before me this 18th day of October, A. D. 1889.

[SEAL.] WILL. HASSINGER,
Notary Public.

My commission expires 16th Oct., 1890.

(Indorsed:) No. 2475. United States of America, district of Colorado. In the United States circuit court. The Slide and Spur Gold Mines, Limited, plaintiff, *vs.* J. Fenton Seymour, defendant. Complaint. Filed Oct. 18, 1889. William A. Willard, clerk. L. S. Dixon, att'y for pl'ff.

And the said summons and proof of service is in words and figures as follows, to wit:

Summons.

In the Circuit Court of the United States for the District of Colorado.

UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

4 THE SLIDE AND SPUR GOLD MINES (LIMITED), Plaintiff, } Complaint Filed in the
versus } Clerk's Office this
J. FENTON SEYMOUR, Defendant. } 18th day of October, A. D. 1889.

The President of the United States of America to J. Fenton Seymour, Greeting:

You are hereby notified that an action has been brought in said court by The Slide and Spur Gold Mines (Limited), plaintiff, against you as defendant to recover the possession of the Slide lode or mine and the Spur lode or mine, situate in Gold Hill mining district, in the county of Boulder and State of Colorado; also lots seven and eight, in block seven, in the town of Gold Hill, in said county and State, and all buildings and improvements on said described premises, and also to recover the sum of $5,000 as damages for the ouster and detention of said premises and for costs of suit, as more particularly set forth and described in the complaint filed herein and to which reference is here made.

You are hereby required to appear and demur or answer to the complaint filed in said action in said court within ten days (exclusive of the day of service) after this summons shall be served on you, if such service shall be made within the county of Arapahoe; otherwise within forty days from the day of service; and if you fail so to do, the said plaintiff will take judgment against you by default, according to the prayer of the said complaint, and will apply to the court for the relief demanded therein.

Witness the Honorable Melville W. Fuller, Chief Justice of the
Supreme Court of the United States, and the seal of the
[SEAL.] said circuit court, at the city of Denver, in said district,
this 18th day of October, A. D. 1889, and of the Inde-
5 pendence of the United States the 114th year.

WILLIAM A. WILLARD, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

Proof of Service.

UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

DENVER, COLO., *Oct. 21st, A. D.* 1889.

I hereby certify that I received the within writ on the 19th day of October, A. D. 1889, and that I have personally served the same upon the said defendant, J. Fenton Seymour, by delivering to J. Fenton Seymour personally a true copy of the within writ at the time and place as follows: At Denver, county of Arapahoe, on the 21st day of October, A. D. 1889.

This writ, therefore, returned executed, as the law directs, this 21st day of October, A. D. 1889.

ZEPH. T. HILL, *Marshal*,
By E. C. CURRIER,
Deputy Marshal.

Marshal's Fees.

Service, 1 defendants, at $2	$2 00
Mileage, 1 miles, at 6c., going only	06
Total	$2 06

(Indorsed:) Gen. No., 2475. Circuit court of the United States for the district of Colorado. The Slide and Spur Gold Mines (Limited), plaintiff, *versus* J. Fenton Seymour, defendant. Summons. Filed this 29th day of October, A. D. 1889. William A. Willard, clerk, by F. W. Tupper, deputy clerk. L. S. Dixon, of Denver, attorney for plaintiff.

And afterwards and on, to wit, the 7th day of November, A. D. 1889, the same being one of the regular juridical days of the November term, A. D. 1889, of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was
6 had and entered of record in said court and in said cause, to wit:

Order: Motion to Quash Summons Denied.

THE SLIDE AND SPUR GOLD MINES, LIMITED, *vs.* J. FENTON SEYMOUR.	2475. Action for Possession of Specific Real Property and for Damages.

At this day comes the said plaintiff, by L. S. Dixon, Esq., its attorney, and the said defendant, by Willard Teller, Esq., his attorney, also comes.

And the motion of the said defendant to quash the summons herein coming on now to be heard is submitted to the court, and, the court being now sufficiently advised in the premises, it is ordered by the court that the said motion be denied.

And thereupon it is ordered that the defendant answer herein within ten days from this day.

And afterwards and on, to wit, the 3rd day of December, A. D. 1889, came the said defendant, by Messrs. Teller & Orahood, his attorneys, and filed in said court and in said cause his demurrer to the complaint heretofore filed herein.

And the said demurrer is in words and figures as follows, to wit:

Demurrer to Complaint.

In the Circuit Court of the United States, District of Colorado.

THE SLIDE AND SPUR GOLD MINES (LIMITED), a Corporation, Plaintiff,
vs.
J. FENTON SEYMOUR, Defendant.

7 Now comes the said defendant, and, demurring to the complaint of the said plaintiff herein, says:

First. The said complaint does not state facts sufficient to constitute a cause of action.

Second. The said complaint avers that plaintiff is a foreign corporation, formed, organized, and existing under and by virtue of the laws of Great Britain, and a subject of Great Britain, and nowhere alleges that the said plaintiff has complied with the laws of the State of Colorado, under and by virtue of the compliance with which alone can entitle the said plaintiff to have or maintain this action in any court of the United States or of the State of Colorado.

Third. The said plaintiff shows no capacity to sue.

Fourth. The said complaint is ambiguous and uncertain in that it states no time at which the said ouster occurred or from which the said detention of the property can be said to be had.

Fifth. The plaintiff demands damages in the sum of five thousand (5,000) dollars for the detention and ouster, and nowhere states at what time such ouster occurred or since what time the detention has been had.

TELLER & ORAHOOD,
Attorneys for Defendant.

(Indorsed:) 2475. Circuit court of the United States. The Slide and Spur Gold Mines (Limited), a corporation, *vs.* J. Fenton Seymour. Demurrer to complaint. Filed Dec. 3, 1889. William A. Willard, clerk. Teller & Orahood, attorneys for defendant.

8 And afterwards and on, to wit, the 18th day of December, A. D. 1889, the same being one of the regular juridical days of the November term, A. D. 1889, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Demurrer to Complaint Overruled.

THE SLIDE AND SPUR GOLD MINES, LIMITED,
vs.
J. FENTON SEYMOUR.

2475.
Action for Possession of Specific Real Property and for Damages.

At this day comes the said plaintiff, by L. S. Dixon, Esq., its attorney, and the said defendant, by Willard Teller, Esq., his attorney, also comes.

And the demurrer to the complaint coming on now to be heard is argued by counsel, and, the court being now sufficiently advised in the premises, it seemeth to the court now here that the said complaint is sufficient in law, and so the said demurrer is overruled.

And thereupon it is ordered by the court that the said defendant answer herein within ten days from this day,

And afterwards and on, to wit, the 28th day of December, A. D. 1889, came again the said defendant, by his attorneys aforesaid, and filed in said court and in said cause his answer to the complaint heretofore filed herein.

And the said answer is in words and figures as follows, to wit:

Answer.

In the Circuit Court of the United States, District of Colorado.

THE SLIDE AND SPUR GOLD MINES (LIMITED), Plaintiff,
vs.
J. FENTON SEYMOUR, Defendant.

9 Now comes the said defendant, and in answer to the said plaintiff's complaint says that as to whether the said plaintiff is a corporation organized and existing under the laws of the United States this defendant has not and cannot obtain sufficient information upon which to base a belief, and he therefore denies that it is such a corporation and denies that it is or ever has been authorized to do business within this State.

This defendant, further answering, denies that the said plaintiff was at the time of the bringing of this action or at any other time seized in fee or seized in any way of the premises mentioned in the said complaint or any part or portion thereof, and denies that this defendant ever wrongfully ousted the said plaintiff from said premises, or that he now does or ever has wrongfully withheld or does wrongfully withhold said premises or any part thereof from said plaintiff; and further denies that said plaintiff was at the time the said suit was brought or at any time before or since suit was brought or is now entitled to the possession of said premises or any part or portion thereof, and further denies that said plaintiff has ever been in the possession of any part or portion of said premises.

And, for a further and separate defense, the said defendant says *actio non*, because he says that heretofore, to wit, on the 19th day of October, 1886, the said property mentioned in the complaint was held and possessed by Ellen R. Seymour and William G. Pell, then and now citizens of the United States and of the State of Colorado, and that upon that day one John Haldeman, of the city of London, England, made application to the said Ellen R. Seymour and William G. Pell to purchase said premises, and thereupon said last-mentioned Seymour and Pell, acting by this defendant & one A. B. Davis, made a proposition in writing to the said Haldeman,
10 which was in words and figures following, to wit:

"DEAR SIR: I agree that in case you cannot raise the required sum within the specified time in your contract, dated about the 9th day of October, between W. F. Bruff, acting under our authority, and yourself, to change the conditions as follows, viz: To sell you the Slide mine for $750,000—25 M *thousand* dollars to be paid one week after the receipt in London of Foster's report, this to be the first payment on the property; the balance of the purchase price, $725,000, to be paid within two months from the date of the payment of $25 M, one ½ in cash and one-half in fully paid common shares of the company to be formed. In case the second and last payment is not made when due, the agreement cancels itself and the $25 M is forfeited. No ore to be taken from the mine after first payment. I further agree to give you a call at par for two months from date of issue upon the shares received as part payment for the property.

(Signed) I. F. SEYMOUR.
A. B. DAVIS."

That thereupon and on the 16th day of May, 1887, the said Haldeman made and entered into an agreement in writing with one Harry Edward Gilbert, which was in words and figures following, to wit:

"An agreement made this sixteenth day of May, one thousand eight hundred and eighty-seven, between John Haldeman of 38 Old Jewry in the city of London, gentleman (hereinafter called the vendor) of the one part and Harry Edward Gilbert of 12 Holford road, Richmond Surrey, gentleman, (but without personal responsibility) for and on behalf of a company intended to be incorporated under the limited liabilities companies acts one thousand eight hundred and sixty-two to one thousand eight hundred and eighty-three under the name of The Slide and Spur Gold Mines Limited (hereinafter called the company) of the other part;

"Whereas the vendor is the beneficial owner of the mining properties known as the Slide and Spur mines situated in the Gold Hill mining district, Boulder county, Colorado, United States — America, and of certain timbered lands situate in the same place more fully described in the report of Mr. Edward O. Wolcott dated the 14th day of January one thousand eight hundred and eighty-seven and the plan therewith, a copy of which report and plan is attached hereto;

"And whereas the vendor is desirous that a company should be incorporated under the companies acts one thousand eight hundred and sixty-two to one thousand eight hundred and eighty-three for the purpose of purchasing, developing and working the said properties being the company for and on behalf of which the said Harry Edward Gilbert joins in this agreement;

"Now it is hereby agreed as follows:—

"1. The company shall be incorporated within one calendar month from the date hereof and the nominal capital of the company shall be four hundred thousand pounds divided into four hundred thousand shares of one pound each.

"2. The vendor shall sell to the said Harry Edward Gilbert for and on behalf of the said company when formed the
11 said properties, and also all *that* the ore which has been raised since April one thousand eight hundred and eighty-six, with the exception of one hundred and seventy-three and a half tons reported to have been sold, and all rights and benefits appertaining thereto, and all the share estate right title and interest of the vendor therein, free from all incumbrances. And the vendor hereby undertakes with the said Harry Edward Gilbert that the same are now absolutely free from incumbrances and shall at the expense of the company cause the same to be duly conveyed to and vested in the

said company, the company (at their own expense) to be duly registered as the proprietors of the properties on the completion of the purchase for the sum of three hundred and seventy-five thousand pounds (£375,000 0 0) that is to say, as to eighty-five thousand pounds (£85,000 0 0) in cash within fourteen days after the first allotment of shares, or as soon thereafter as may be agreed on, and upon the property, free from incumbrances becoming to the satisfaction of the said company or its legal advisers vested in the said company, or as it may direct, under a good and perfect title, and as to one hundred and thirty-three thousand pounds (£133,000 0 0) in fully paid-up shares of the company of one pound each numbered from one to one hundred and thirty-three thousand both inclusive, and as to the balance of one hundred and fifty-seven thousand pounds (£157,000 0 0) in cash or fully paid-up shares, or part in cash or part in shares at the option of the directors of the said company. Provided always and it is hereby agreed that all such fully paid shares or part thereof as hereinbefore mentioned shall be allotted as fully paid shares to the vendor or his nominees within one calendar month after the first allotment of shares, and provided the property shall then be vested in the company or otherwise as hereinbefore provided. Provided always and it is hereby agreed that the company in making cash payments to the vendor shall reserve out of the shares subscribed for a minimum of five thousand (5,000) shares towards providing working capital.

"3. The memorandum and articles of association and the prospectus shall be submitted to the vendor for his approval before issue.

"4. The vendor shall give to the proposed company all the necessary information and assistance for the formation of the same and for the carrying on of its intended operations.

"5. The vendor will discharge all payments and claims for commissions, negotiations, services, brokerages, advertising, printing, legal, engineers' reports, and other expenses preliminary or otherwise up to the time of the first allotment of shares and the vendor shall indemnify the company and the directors thereof from and against all proceedings, claims and demands in respect of the said preliminary expenses, but the vendor shall be at liberty to make any arrangements with agents or others, under this clause, for providing said expenses, so that such arrangements do not involve any liability on the company.

"6. On the adoption of this agreement, with or without modification, by the company, the said Harry Edward Gilbert shall be discharged from all responsibility, and if the company so require, a fresh agreement shall be entered into between the vendor and the company in the same terms as this agreement and in substitution therefor.

"7. Any dispute or difference which may arise touching these presents or any matter or thing arising thereunder or in connection with shall be referred to arbitration in the usual way as provided by the common-law procedure act one thousand eight hundred and fifty-four.

"As witness the hands of the said parties on the day and year first above written.

"JNO. HALDEMAN.
"HARRY EDWARD GILBERT.

"Witness:
"T. A. DENNISON,
"*Sol'r, 4 Eastcheap.*"

This defendant further says that after the giving of said option of October 19th, 1886, as above set forth, the said Haldeman accepted said option and paid in pursuance thereof the sum of fifty-eight thousand four hundred and forty-three and $\frac{50}{100}$ (58,443.50) dollars up to the 7th day of July, 1887, and no more; that afterwards, to wit, on the 18th day of August, 1887, the said Haldeman, not being able to comply with the terms of said option, obtained from said Ellen R. Seymour and William G. Pell another contract; which said contract was in words and figures as follows, to wit:

Memorandum of agreement made this eighteenth day of August, 1887 between John Haldeman of 38 Old Jewry in the city of London and J. Fenton Seymour of Denver, Colorado in the United States of America acting for himself and partners the owners of the Slide and Spur gold mines situate in Boulder county Colorado United States of America the said John Haldeman agrees to pay forthwith the sum of ten thousand pounds sterling in addition to twelve thousand five hundred pounds already paid on account of the purchase-money of the said mines such sum of ten thousand pounds to be paid through Messrs. Wells Fargo & Co. (who now hold the deeds of the said property in escrow) and to be held by them and paid over to the said J. Fenton Seymour upon the titles of the said mines being registered in the name of the "Slide and Spur gold mines" limited free from all charges and incumbrances and the said J. Fenton Seymour hereby undertakes and agrees to register the titles as above upon the said ten thousand pounds being deposited with Messrs. Wells Fargo & Co.

The said J. Fenton Seymour hereby undertakes and agrees to have the Slide mine worked to its full capacity and after the due and legal registration of the title to the said company he further agrees that the returns from the said mine shall be cabled weekly to the said company in the form of cables sent herewith, it being understood and agreed that the money value of the first weekly return so cabled shall not be less than the sum of two hundred pounds sterling and that each successive weekly return shall show a moderate increase over that sum.

The said J. Fenton Seymour hereby undertakes and agrees to take the control of the management of the said property until the payments hereinafter mentioned are completed, and it is understood and agreed that he shall retain such control until the said payments are completed. The said John Haldeman agrees that three hundred and seventy-five thousand shares of one pound each in the above company shall be transferred to Mr. Clarence Preston

Elder as trustee and deposited with Messrs. Wells Fargo & 13 Co. in London to the intent that the said shares shall be held as security for the due performance of the following conditions viz:—

1st. The payment of ten thousand pounds in addition to the above-mentioned twenty-two thousand (J. F. S.) five hundred pounds within three days (J. F. S.) after the receipt of the third successive weekly return from the mine as hereinbefore mentioned and

2nd. The balance of forty-five thousand pounds at the expiration of ten days after the receipt of eight successive weekly returns of the nature and value above specified. Upon the completion of the above-mentioned payments the said J. Fenton Seymour hereby undertakes and agre*ed* to release the above-mentioned three hundred and seventy-five thousand shares less seventy-seven thousand five hundred to which he is entitled, and also less the number of shares sold with the consent and under the supervision of the aforesaid Clarence Preston Elder acting for the said J. Fenton Seymour.

In case the weekly returns cabled from the mine shall from any cause fall below the sum of two hundred pounds sterling per week then in that case such returns shall not count but the time for paying the second ten thousand pounds and the balance of forty-five thousand pounds shall be extended *pro rata*, but should the successive weekly returns amount to two hundred pounds sterling (per week J. F. S.) with a moderate increase weekly as hereinbefore mentioned and the said John Haldeman shall make default in the payment of the balance of forty-five thousand pounds then in that case the said J. Fenton Seymour shall have the right to forfeit the amounts already paid and to claim the above-mentioned three hundred and seventy-five thousand shares.

As witness the hands of the said parties the day and date first above written.

(Signed) J. FENTON SEYMOUR.
JNO. HALDEMAN.

The following endorsements appear upon the back of said agreement: "Agreement. John Haldeman & J. Fenton Seymour. State of Colorado, county of Boulder, *ss:* I hereby certify that this instrument was filed for record in my office this 18 day of Dec., A. D. 1887, at 10.10 o'clock a. m., and is duly recorded in Book 121, on page 139. James Cowie, recorder, by —— ——, deputy. No. 3115. Fees, $1.75."

This defendant further says that in making said contract he was acting for and in behalf of the owners of said property, Ellen R. Seymour and William G. Pell, and as their agent, which fact 14 was well known to the said John Haldeman, and that the said Haldeman was at the time of the making of said contract one of the board of directors of the said plaintiff herein, and was acting manager of its business, and was the only officer of said company acting for said company, and that the said plaintiff had full knowledge at that time and ever since of the said contract of the said Haldeman, and that the said Haldeman was not the owner of the same and had not paid for the same, and that the said contract was made for the benefit of the said plaintiff and the said Haldeman and only to enable the said plaintiff to issue stock, which it could not do until the legal title to said mine was in the said company, the plaintiff herein, and that it was then and there fully understood and agreed that this defendant should remain in the full, entire, and complete possession of the property, and should be entitled to remain in such possession until the purchase price for said property had been fully paid to the owners, and that such possession should be held by the defendant for and his possession should be the possession of the said owners as well as his own.

This defendant further shows that immediately upon the execution of said last-mentioned contract the same was laid before the said plaintiff, and before the said contract had been executed by registration of the said deeds mentioned in the said contract; which registration occurred on the 6th day of September, A. D. 1887.

This defendant, further answering, says that no delivery of the deeds to said property ever was made or agreed to be made to the said Haldeman or to the plaintiff or to any person for them or either of them. This defendant further says that, by agreement originally made with the said Haldeman, the deeds were to be made and when made were to run to the said Haldeman as grantee, but that, at the said Haldeman's request, said Haldeman, acting both for himself
and for the said plaintiff and as its agent, the name of the
15 grantee was changed and the name of the plaintiff inserted
as the grantee, and that said change was made at the time of
the making of said contract of August 18th, 1887.

This defendant further says that on the 10th day of September, 1887, the said Haldeman, acting for himself, and also acting as one of the directors of said plaintiff, made and entered into an agreement with the said plaintiff; which said agreement was in words and figures following, to wit:

"An agreement made the tenth day of September, one thousand eight hundred and eighty-seven, between the Slide and Spur Gold Mines, Limited, hereinafter called the company, of the first part; John Haldeman, of 38 Old Jewry, in the city of London, gentleman, of the second part, and Harry Edward Gilbert, of 12 Holford road, Richmond, Surrey, gentleman, of the third part.

"Whereas by an agreement dated the sixteenth May one thousand eight hundred and eighty-seven and made between the said John Haldeman of the first part and the said Harry Edward Gilbert for and on behalf of the company then intended to be and which has since been formed under the companies acts 1862 to 1886 of the other part the said John Haldeman agreed to sell and the said company to purchase certain mines and property in the said agreement described, upon the terms and subject to the stipulations and conditions therein contained:

"Now these presents witness and it is hereby agreed as follows:

"1. The said recited agreement is hereby subject to the modifications thereof hereinafter contained, adopted by and shall subject to such modifications, be binding on the company and on the said John Haldeman in the same manner and be read and construed in all respects as if the company had been in existence at the date thereof and had been party thereto instead of the said Harry Edward Gilbert.

"2. Clause 2 of the said agreement shall be cancelled and the following clause shall be substituted in lieu thereof, viz: The said John Haldeman shall sell to the said company the said lands mines and properties referred to in the said agreement of the sixteenth day of May one thousand eight hundred and eighty-seven and the freehold thereof free from all incumbrances and liabilities whatsoever and also all *that* the ore which has been raised since April one thousand eight hundred and eighty-six with the exception of one hundred and seventy-three and a half tons reported to have been sold, and all water and other rights easements benefits and appurtenances belonging or appertaining thereto, and all the estate right title and interest of the said John Haldeman therein, and also all machinery plant and effects live and dead stock on or belonging to the same or any part thereof, free from all incumbrances and liabilities whatsoever, and the said John Haldeman shall make out and show to the satisfaction of the said company or such person as they may appoint a perfect complete and indisputable title to the said lands and premises, free from all incumbrances and liabilities
whatsoever, according to the laws in force in Colorado in
16 the United States of America, who shall certify that the said
title is free and unincumbered, and that the said John Haldeman has full right *right* and power to sell the same to the said company freed from all incumbrances and liabilities whatsoever, but subject to any Government taxes charges or impositions which shall be properly payable by the said company for the purpose of vesting and registering the said properties in the said company. And the said John Haldeman shall at the expense of the company execute and procure to be executed all deeds and documents and do and procure to be done all acts and things which the directors may be advised to be necessary for vesting the said mines and premises in the company as aforesaid, and at their expense for procuring the registration of the company as the proprietors and owners of the said mines and premises according to the customs and laws of Colorado aforesaid at the time applicable to the district where the said mines are situate, for and in consideration of the absolute allotment to him of three hundred and seventy-five thousand one pound fully paid shares in the said company, the said shares to be allotted to the said John Haldeman or his nominees as soon as the directors shall have been satisfied that the said mines and property as aforesaid have been transferred to the company free from all incumbrances and liabilities whatsoever, that the deeds of transfer have been duly registered and recorded in the office of the county clerk and recorder of Boulder county in the State of Colorado, in the

United States of America, and that the company has been put and is in absolute working possession of the property as aforesaid, with such good perfect free indisputable and unincumbered title as aforesaid. Provided always and it is hereby agreed that all such fully paid shares or part thereof as hereinbefore mentioned shall be allotted as fully paid shares to the said John Haldeman or his nominees without any further liability of any kind whatsoever attaching thereto.

"The said Harry Edward Gilbert shall henceforth be discharged and freed from all liabilities and obligations whatsoever incurred by him under the said agreement of the sixteenth day of May one thousand eight hundred and eighty-seven in the same manner as if he had not been a party to that agreement.

"In witness whereof the parties hereto of the second and third parts have hereunto set their hands and the party of the first part have caused their common seal to be hereunto affixed in the presence of two directors the day and year first above written.

"Directors R. M. N. KERRELL, of Hillhouse.
"J. KEATINGE POLLOCK.
"G. W. HUTCHINSON, *Secretary.* { SEAL OF THE COMPANY. }
"JNO. HALDEMAN.
"H. E. GILBERT.

"Witness to all the above signatures:
"LIONEL BLUGLEY,
"4 *Eastcheap, E. C., Sol'r.*"

This defendant further shows that he is informed and believes, and so charges the fact to be, that the said plaintiff, at the request of the said Haldeman and for his benefit, caused three hundred and seventy-five thousand (375,000) shares of the capital stock of said company, four hundred thousand (400,000) shares being
17 the whole of the capital stock of said company, to be issued
to the said Haldeman; that such stock was issued without having been subscribed for by any person and without any payment by any person whatever of any sum whatever, and was never received by the said defendant nor said Ellen R. Seymour and William G. Pell or either of them in payment of any sum whatever upon the purchase-money of said property in any way whatever.

This defendant further says that afterwards and while this defendant was in the full, exclusive, and undisputed possession and control of said premises mentioned in the said complaint for the said Ellen R. Seymour and William G. Pell, and while he was thus acting as their agent and holding possession and control for them and for them only, in accordance with the said agreement of August 18th, 1887, which said agreement was not only known to the said plaintiff at the time of the making thereof, but was made the basis of all its subsequent action in respect to the issue of stock, &c., as above stated, the said Haldeman, still acting for himself and also as one of the members of the board of directors of the said plaintiff and as the agent of the said plaintiff, finding himself unable to comply with the terms of said contract of August 18th, 1887, though the said defendant and the said Ellen R. Seymour and William G. Pell had fully complied with the terms of the said contract on the part of each and all of them, and the said Haldeman having paid on said contract of August 18th, 1887, forty-eight thousand three hundred and ten (48,310) dollars only, the said John Haldeman, acting for himself, and also acting for the said plaintiff as its agent, and then and there being a member of its board of directors, made and entered into another agreement in writing with this defendant, acting for and in the interest of and as the agent of the said Ellen R. Seymour and William G. Pell, 18 which said agreement bore the date of October 5th, 1888, and was to the effect that, upon the payment to them of the sum of three thousand five hundred pounds sterling, as part of the said purchase-money for the said property, they, the said Ellen R. Seymour, William G. Pell, and this defendant, would start the working of said mine under the control and for the credit of this defendant, and that the said plaintiff might, if it saw fit, send from England a cashier and engineer, and that this defendant should be made a director and resident manager of the company for the period of one year; that the proceeds were to be transmitted to the company's bankers, and that Clarence P. Elder, who was then holding the three hundred and seventy-five thousand (375,000) shares of the company's stock, might deliver seventy-five thousand (75,000) shares of such stock to certain parties, who had subscribed and paid for certain stock of said company and who were known as the "Scotch subscribers," and to one Rust forty-five thousand (45,000) shares of said stock on the payment by said Rust of the sum subscribed by him for said stock, and that the balance of said stock so placed in said Elder's hands should remain in his hands until a final settlement could be made of the amount due upon the purchase price of said premises mentioned in the complaint, and that such settlement should be made within three months from the date of the execution of said contract; and, further, that whoever should pay in cash the said three thousand five hundred (3,500) pounds sterling mentioned in said contract should be entitled to receive from said Elder fifteen thousand (15,000) shares of said stock on the final settlement, as above stated; and thereupon and afterwards, to wit, on the 15th day of December, 1888, said sum of three thousand five hun- 19 dred (3,500) pounds sterling, or seventeen thousand forty-five (17,045) dollars, was paid to this defendant for the said Ellen R. Seymour and William G. Pell.

And this defendant further says that he did afterwards, and immediately upon the payment of the said sum of three thousand five hundred (3,500) pounds sterling, cause the said mine to be worked in accordance with the terms of said contract, and did transmit all the proceeds of said mine to the company bankers as provided for in said contract; and the said Elder did, in pursuance of the consent and release of said stock in said last-mentioned contract by the defendant, deliver to the said Scotch subscribers the said seventy-five thousand (75,000) shares and to the said Rust the said forty-five thousand (45,000) shares and to one Wilson the said fifteen thousand (15,000) shares mentioned therein, and this defendant avers that he did, both for himself and for the said Ellen R. Seymour and William G. Pell, do and perform all and every act or thing required by said contract of August 18th, 1887, and of October 5th, 1888, to be done and performed.

This defendant further says that the capital stock of plaintiff was and is fixed at four hundred thousand (400,000) shares of one (1) pound sterling each, no part of which has ever been paid into said company in money or property, except that said company pretends that it issued the three hundred and seventy-five thousand (375,000) shares of said stock to the said Haldeman in exchange for the title to the premises mentioned in the complaint; but this defendant denies that it was thus issued in exchange for stock, but avers that such issue was made by said company with full and complete knowledge of the fact that said Haldeman had no title to said property, and that no complete or perfect title could or would pass to him or to any person designated by him until
20 the purchase price for said property had been fully paid, and
that it was expressly agreed by and between the said Haldeman and the said plaintiff and the owners of the said premises, to wit, Ellen R. Seymour and William G. Pell, and also with this defendant, that said deeds to said premises were procured to be registered and recorded by this defendant for the sole and only purpose of enabling the said plaintiff to obtain subscriptions to and to issue the stock of the said company plaintiff, and that this defendant should hold the possession of said premises for the vendors mentioned in said deed until the purchase-money should be fully paid, and that the said contract or proposition offered by the vendors by and through this defendant, and being of date the 5th day of October, 1888, was to affect the status and condition of said property and defendant's right to redeem possession thereof only as therein expressed, to wit, in respect to working the property and transmitting the proceeds, and this defendant avers that the said contract of August 18th, 1887, under which the deeds were registered and under and by virtue of which this defendant went into possession of said property with the right to hold possession of the same until the purchase price for said property should be paid in full, is still in force and has never at any time been cancelled, annulled, released, or discharged in any respect so far as it relates to the possession of said premises and the right to remain in the possession thereof; and this defendant further avers that the said plaintiff has at no time ever been in possession of the said premises, nor has it at any time ever been entitled to the possession of the same; that no delivery of the deeds to said property has ever been made to the said plaintiff, nor has any delivery of the possession of said property or of said property ever been made to the said plaintiff or to any person for it, nor has there ever been
21 any agreement whatever on the part of anybody to deliver
possession thereof until the purchase price had been paid in

full, which said price has not been paid in full or otherwise except as above stated.

TELLER & ORAHOOD,
Att'ys for D'f't.

STATE OF COLORADO, } ss:
County of Arapahoe, }

J. Fenton Seymour, being first duly sworn, on his oath deposes and says that he is the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true except as to the matters and things which are therein stated on information and belief, and as to those he believes it to be true.

J. FENTON SEYMOUR.

Subscribed and sworn to before me this 28th day of December, 1889.

[SEAL.]
WILLIAM A. WILLARD,
Clerk District Court U. S.,
By F. W. TUPPER, *Deputy Clerk.*

(Indorsed:) 2475. Circuit court of United States. The Slide and Spur Gold Mines (Limited) *vs.* J. Fenton Seymour. Answer to complaint. Filed Dec. 28, 1889. William A. Willard, clerk. Teller & Orahood, attorneys for defendant.

And afterwards and on, to wit, the 7th day of January, A. D. 1890, came again the said plaintiff, by its attorney aforesaid, and filed in said court and in said cause its replication to the answer
22 heretofore filed herein.

And the said replication is in words and figures as follows, to wit:

Replication.

In the Circuit Court of the United States, District of Colorado.

THE SLIDE AND SPUR GOLD MINES (LIMITED), Plaintiff, }
vs. } Replication.
J. FENTON SEYMOUR, Defendant. }

The plaintiff, for reply to the second defense in the answer contained, says—

That it denies that at the time of the making of the contract bearing date August 18th, 1887, in said defense set forth, the said John Haldeman was one of the board of directors of this plaintiff or was acting manager of its business or in any manner or way whatsoever such manager or had any authority or agency whatsoever therein or was in any manner or to any extent an officer of this plaintiff company acting for it.

'Denies that at the time of the making of said contract or ever since or ever at any time it had or has had or now has full or any knowledge whatsoever that the said Haldeman was not the owner of the same or had not paid for the same.

Denies that the said contract was made for the benefit of this plaintiff and the said Haldeman or for the benefit of this plaintiff at all, but admits that the same may have been made by said Haldeman and J. Fenton Seymour, the other party thereto, to enable this plaintiff to issue its capital stock for the benefit of said Halde-
man and the said J. Fenton Seymour or the other persons
23 or parties in interest whom he represented, it being true, as
in said defense alleged, that by the laws of Great Britain under which this plaintiff was organized and became and was and is a body corporate and politic it could not issue such stock until the legal title to said mines, free from all charges and incumbrances, as in said contract specified and agreed, was conveyed to and vested in it.

Denies that it was then and there or at any other time or place fully or in any manner whatsoever understood or agreed that the defendant should remain in the full, entire, or complete possession or in any possession of the property or should be entitled to remain in such or any other possession until the purchase price for said property had been fully or in any manner paid to the owners, or that such or any other possession should be held by the defendant for or his possession or any possession by him should be the possession of the said owners as well as his own, as in the said defense in this behalf alleged.

Denies that no delivery of the deeds to said property was ever made or agreed to be made to the said Haldeman or to this plaintiff or to any person for them or either of them.

Denies that the change of the name of the grantee in the deeds from said Haldeman, as grantor, to this plaintiff, as grantee, was made at the request of said Haldeman acting for this plaintiff, or that said Haldeman was therein acting for or in any manner authorized to act for this plaintiff, and denies that said change was made at the time of the making of said contract of August 18th, 1887, but, on the contrary, avers that said change was made more than two months prior to said 18th day of August.

Denies that the said Haldeman on the 10th day of Sep-
24 tember, 1887, was acting as one of the directors of this plain-
tiff at the time the agreement of that date set forth in said defense was made and entered into, or that said Haldeman in any manner acted, took part, or was concerned in making said agreement for this plaintiff as one of its directors, or that he was a director at that time empowered or authorized to act for this defendant or in any manner to participate in the deliberations of its board of directors.

Denies that the three hundred and seventy-five thousand shares of the capital stock of this plaintiff issued to the said Haldeman, as in said defense alleged, was issued without having been subscribed for by any person or without any payment by any person whatever of any sum whatever, as in said defense alleged, or that the same was never received by said defendant nor said Ellen R. Seymour and

William G. Pell nor either of them in payment of any sum whatever upon the purchase-money of said property in any way whatever.

Denies that the said defendant was afterwards or ever at any time in the full, exclusive, or undisputed possession or control of the premises mentioned in the complaint or in any control or possession whatsoever of the same for the said Ellen R. Seymour and William G. Pell or either of them, or that the said defendant was afterwards or at any time acting as their agent or the agent of either of them in holding possession or control for them or either of them in supposed accordance with said agreement of August 18th, 1887, as in said defense alleged.

Denies that said Haldeman thereafter at any time acted as one of the members of the board of directors of this plaintiff or as the agent of this plaintiff, or while so acting or assuming to act found himself unable to comply with the terms of said contract of
25 August 18th, 1887, or that the said defendant and the said Ellen R. Seymour and William G. Pell, all or any or either of them, had fully or at all or in any way or in any particular complied with the terms of the said contract on their part or the part of each or any or all of them to be complied with, or that the said Haldeman, acting for this plaintiff or as its agent or as being a member of its board of directors, made or entered into another agreement in writing, bearing date October 5th, 1888, as in said defense alleged, and denies that the said Haldeman in making any agreement of that or any other date with the said defendant was acting for this plaintiff or as its agent or as a member of its board of directors or was in any manner or to any intent or purpose authorized so to act.

Denies that said Haldeman made or entered into any agreement whatsoever with the said defendant bearing date October 5th, 1888, or any other date of the kind, nature, or effect as in that regard lastly set forth in said defense, or that any other person or persons entered into an agreement in writing with said defendant, he being the agent and acting for and in the interest of the said Ellen R. Seymour and William G. Pell, which bore the date of October 5th, 1888, or any other date, or was to the effect that upon the payment of the sum of three thousand five hundred pounds sterling, as part of the purchase-money for the said property, they, the said Ellen R. Seymour, William G. Pell, and said defendant, would start the working of said mine under the control and for the credit of said defendant.

Denies that the sum of three thousand five hundred pounds mentioned in the agreement of October 5th, 1888, was by the said agreement to be paid to said defendant as the agent of the
26 said Ellen R. Seymour and William G. Pell or to the said Ellen R. Seymour and William G. Pell as part of the purchase-money for said property, or that the same was so paid to the said defendant for the said Ellen R. Seymour and William G. Pell, save only as the same was paid to and received by said defendant in consideration of the sale then made by said

defendant of fifteen thousand shares of the capital stock of this plaintiff company then owned by the said Ellen R. Seymour and William G. Pell and controlled by the said defendant and the said Clarence P. Elder, the said shares of stock being part and parcel of the three hundred and seventy-five thousand shares held by the said Elder as trustee under and in pursuance of said contract of August 18th, 1887, as in said defense set forth, having, together with all other of said shares, become forfeited to the said Ellen R. Seymour and William G. Pell in accordance with the terms of said last-named contract, and the said defendant, as the agent of the said Ellen R. Seymour and William G. Pell, thereunto authorized, having elected, as well by the said act of sale of said fifteen thousand shares as of the sale and transfer of the great number of other shares mentioned in the contract of October 5th, 1888, the same being parcel of said 375,000 shares, to treat the said shares as forfeited and no longer the property of said Haldeman, subject to pledge or held as collateral security, but as the absolute property of the said Ellen R. Seymour and William G. Pell.

Denies that by the agreement of October 5th, 1888, the said Ellen R. Seymour and William G. Pell or either of them were to start the working of the mine or to be in any manner, directly or indirectly, connected with or interested in the starting of such work or the working of the same under the control of said defendant or otherwise, or that the same was to be worked under the control of said defendant, except as, with the approbation and consent of this plaintiff, he might act as its manager of said property at the will and pleasure of its board of directors.

27 Denies that the said forty-five thousand shares of capital stock agreed to be delivered to said Rust were to be delivered on payment by said Rust of the sum or any sum subscribed by him for said stock or on the payment of any other sum than the three thousand five hundred pounds mentioned in the agreement of October 5th, 1888.

Denies that it was provided by the agreement of October 5th, 1888, that the balance of said stock placed in the hands of said Elder should remain in his hands until a final settlement could be made of the amount due upon the purchase price of said premises mentioned in the complaint, or that such settlement should be made within three months from the date of the execution of such contract.

Denies that said defendant did afterwards or immediately upon the payment of the said sum of three thousand five hundred pounds sterling, or at any other time, cause the said mine to be worked in accordance with the terms of the contract of October 5th, 1888, or did transmit all or any of the proceeds of said mine to the company bankers as provided for therein, or that the said defendant did, for himself or for said Ellen R. Seymour and William G. Pell or either of them or for this plaintiff or any one else, do or perform all or any act or thing required by said contract of August 18th, 1887, or the agreement of October 5th, 1888, to be done or performed, save in the procurement of the titles of said mines to be registered in the name of the plaintiff, free from all charges and incumbrances,

in accordance with said contract of August 18th, 1887, as in said defense alleged, and also in causing the shares of stock mentioned in the agreement of October 5th, 1888, to be transferred and
28 delivered as therein and thereby agreed upon and as is in said defense likewise alleged; and denies that any act or thing to be done or performed by said defendant under said contract of August 18th, 1887, or the agreement of October 5th, 1888, in the working, management, or control of said mines or the reporting or disposal of the proceeds of ores taken therefrom was to be done or was done or performed for himself and the said Ellen R. Seymour and William G. Pell or for himself alone or for the said Ellen R. Seymour and William G. Pell or either of them, jointly or severally, as principals or principal, or party or parties in any way directly interested in the working, management, or control of said mines or in the proceeds of the ores taken or to be taken therefrom.

Denies that no part of the four hundred thousand pounds represented by the shares of the capital stock of this company, plaintiff, has ever been paid into this company in money or property, and avers that the said three hundred and seventy-five thousand shares of said stock issued to the said Haldeman in exchange for the title to the premises mentioned in the complaint, as in said defense alleged, were in truth and in fact so issued in exchange, and admits that the denial in said defense that the said shares were issued in exchange for stock is well founded and true.

Denies that said issue of said three hundred and seventy-five thousand shares was made by this defendant with full or complete or with any knowledge whatsoever of the fact that said Haldeman had no title to said property or that no complete or perfect title could or would pass to him or to any person designated by him until the purchase price for said property had been fully paid, and avers the contrary of said latter averment of said defense to be true.

Denies that it was expressly or otherwise agreed by or between the said Haldeman and this plaintiff and the owners of the said premises, namely, Ellen R. Seymour and William G. Pell, and also
29 with said defendant or by or between or with any or either of said parties with any, either, or all of the others that said deeds of said premises were procured to be registered or recorded by said defendant for the sole or only purpose of enabling this plaintiff to obtain subscriptions to or to issue its capital stock, and denies that this plaintiff in accepting delivery of said deeds and causing the same to be registered had any other purpose than to obtain title to said property, free from all charges and incumbrances, upon full payment of the price therefor in its shares of capital stock issued and delivered as contemplated and agreed upon by and between said Haldeman and said defendant in and by their said contract of August 18th, 1887.

Denies that it was expressly or otherwise agreed by or between the said Haldeman and this plaintiff and the said Ellen R. Seymour and William G. Pell and the said defendant, or by or between any or either of said parties with any, either, or all of the others, that said defendant should hold possession of said premises for the ven-

dors mentioned in said deed until the purchase-money should be fully paid, or that said contract or proposition of date the 5th day of October, 1888, offered by said vendors by and through said defendant, was to affect the status or condition of said property or said defendant's alleged right to retain possession thereof only in respect to working the property and transmitting the proceeds, or that it was expressed in such contract or proposition that it should only so affect the status or condition of said property or said defendant's pretended right to retain possession thereof; and denies that this plaintiff has at any time been or become a party or in any manner given its assent to or had any knowledge or notice of any
30 contract or agreement whatsoever whereby the said defendant was to have any possession or control of said property or any part thereof, save only as he was acting as the agent or manager of this plaintiff in possession and in charge for its use, protection, and benefit, and subject, without limit or qualification, to the direction, orders, and commands of its board of directors and to dismissal from such employment whenever the said board saw fit to exercise its power for that purpose.

Denies that under or by virtue of said contract of August 18th, 1887, defendant went into possession of said property with the right to hold possession of the same until the purchase price for said property should be paid in full or until the payments specified in said contract should be completed with any other intent or for any other purpose, as shown by said contract, than to give to him, said defendant, until such payments were made or the shares of stock held as collateral were forfeited, employment as the mere manager or party in control of the management of said mines for the use and benefit of the lawful owner or proprietor thereof, namely, for the use and benefit of this plaintiff, when, after the full payment by it of the price therefor, it should become such owner and proprietor as contemplated by said contract, or that the said defendant or the said Haldeman, the sole parties thereto, had in or by said contract, as appears therefrom, any purpose or intention thereby to create any lien, charge, or incumbrance upon said property, or any perpetual or other continuous or absolute right of any kind to the possession and enjoyment of the same as against this plaintiff, after such full payment of the price therefor made by this plaintiff upon the express agreement, covenant, and understanding that title thereof was to be and was and is vested in this plaintiff, free from all charges and incumbrances.

Denies that the said defendant is or was at the time of the
31 commencement of this action or for more than a year prior thereto had been in the possession of said property under or by virtue of said contract of August 18th, 1887, or with any right to hold possession of the same until the purchase price for said property shall be paid in full by the said Haldeman or by whomsoever owes the same, and denies that said contract is still in force or that it has never been cancelled, annulled, released, or discharged in any respect so far as it relates to the possession of said premises by the defendant or to any supposed right on his part to remain in

the possession thereof; and avers that it has been so cancelled, annulled, released, and discharged, and is no longer of any force or effect so far as the possession of said premises by said defendant or any right claimed by him to such possession are concerned.

Denies that this plaintiff has at no time ever been in possession of the said premises or that it has not at any time been entitled to the possession of the same.

Denies that no delivery of the deeds to said property has ever been made to this plaintiff or that no delivery of the possession of said property has ever been made to this plaintiff or to any person for it; and denies that there has never been any agreement whatever on the part of anybody to deliver possession thereof until the purchase price had been paid in full.

And, lastly, denies that said purchase price has not been paid in full by this plaintiff, however it may be otherwise stated or claimed in said defense.

L. S. DIXON,
Attorney for Plaintiff.

STATE OF COLORADO, } ss:
County of Arapahoe, }

32 Luther S. Dixon, being duly sworn, says that he is the attorney for the plaintiff in this action; that he has read the foregoing replication and knows the contents thereof, and that the same is true to the best of his knowledge and belief.

LUTHER S. DIXON.

Subscribed and sworn to before me this 7th day of January, A. D. 1890.

[SEAL.]

WILLIAM A. WILLARD,
Clerk Dist. Court U. S.,
By F. W. TUPPER, *Deputy Clerk.*

(Indorsed:) No. 2475. Circuit court of the United States. The Slide and Spur Gold Mines (Limited) *v.* J. Fenton Seymour. Replication. Filed Jan. 7, 1890. William A. Willard, clerk. L. S. Dixon, attorney for plaintiff.

And afterwards and on, to wit, the 15th day of March, A. D. 1890, the same being one of the regular juridical days of the November term, A. D. 1889, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Trial. Finding for Plaintiff. Judgment.

THE SLIDE AND SPUR GOLD MINES, LIMITED, } 2475.
vs. } Action for Possession of Specific Real Property and for
J. FENTON SEYMOUR. } Damages.

This cause having been brought on for hearing and trial in said court on this fifteenth day of March, A. D. 1890, before the Honor-

able Moses Hallett, district judge, a trial by jury having been ex-
pressly waived by written stipulation of the respective parties
to said cause, the above-named plaintiff, The Slide and Spur
33 Gold Mines, Limited, appearing by Mr. L. S. Dixon, its at-
torney, and the above-named defendant, J. Fenton Seymour,
appearing by Willard Teller, Esq., his attorney, upon the issues of fact herein joined by the pleadings of the respective parties filed herein, and the court, having heard all the testimony produced on behalf of the plaintiff, as well as all the testimony produced on behalf of the defendant, and having heard the arguments of counsel and being sufficiently advised in the premises, doth find upon the issues of fact herein joined in favor of the plaintiff and against the defendant, and doth further find that all the matters and things in the complaint of the plaintiff filed, herein alleged, are true as therein stated, and that said plaintiff is entitled to recover of and from the said defendant the possession of the property and premises in said complaint described.

Wherefore it is adjudged that the plaintiff, The Slide and Spur Gold Mines, Limited, recover of the defendant, J. Fenton Seymour, the possession of the following-described real property and premises, to wit: The Slide lode or mine, being fifteen hundred feet in length and one hundred and fifty feet in width, and also the Spur lode or mine, being thirteen hundred feet in length and one hundred and fifty feet in width, together with all shafts, levels, and other workings upon and connected with said lodes or mines; also the shaft and engine house, the ore-house and blacksmith shop, and all other buildings and improvements thereon; said above-described property being situate in Gold Hill mining district, in the county of Boulder and State of Colorado; also of lots seven (7) and eight (8), in block number seven (7), in the town of Gold Hill, in said county of Boulder and State of Colorado, together with all buildings and improvements
thereon, and that it have a writ of possession therefor.

34 And it is further adjudged that the said plaintiff recover
of and from said defendant its costs in this action incurred,
and that it have an execution therefor.

And afterwards and on, to wit, the 26th day of March, A. D. 1890, the same being one of the regular juridical days of the November term, A. D. 1889, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Motion for New Trial Denied.

THE SLIDE AND SPUR GOLD MINES, LIMITED, *vs.* J. FENTON SEYMOUR.	2475. Action for Possession of Specific Real Property and for Damages.

At this day comes the said plaintiff, by L. S. Dixon, Esq., its attorney, and the said defendant, by Willard Teller, Esq., his attorney, also comes.

And the motion of the said defendant to vacate the judgment and grant a new trial herein having heretofore come on to be heard and having been argued by counsel and by the court taken under advisement, and the court being now sufficiently advised in the premises, it is ordered by the court, for good and sufficient reasons to the court appearing, that the said motion be denied.

And afterwards and on, to wit, the 29th day of March, A. D. 1890, the same being one of the regular juridical days of the November term, A. D. 1889, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

35 *Order: Judgment Vacated. New Trial Granted.*

THE SLIDE AND SPUR GOLD MINES, LIMITED,
vs.
J. FENTON SEYMOUR.

2475.
Action for Possession of Specific Real Property and for Damages.

At this day comes the said defendant, by H. M. Orahood, Esq., his attorney, and moves the court to vacate the judgment lately had herein and for a new trial of the issues herein.

And it appearing to the court that the taxed costs herein have been fully paid and discharged by the said defendant—

Therefore it is ordered that the judgment lately and on the 15th day of March last past had herein be vacated and for naught held, and that a new trial of the issues herein joined be had in pursuance of the statute in such case made and provided.

And afterwards and on, to wit, the 28th day of June, A. D. 1890, the same being one of the regular juridical days of the May term, A. D. 1890, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Trial. Verdict.

THE SLIDE AND SPUR GOLD MINES, LIMITED,
vs.
J. FENTON SEYMOUR.

2475.
Action for Possession of Specific Real Property and for Damages.

At this day comes the said plaintiff, by L. S. Dixon, Esq., its attorney, and the said defendant, by Willard Teller, Esq., his attorney, also comes, and thereupon comes a jury, to wit, C. I. Colwell, W. M. McMechen, H. H. Snarr, Edward H. Clowminzer, Thomas B. Croke,
Frank J. Boot, A. J. Baker, Edgar R. Barkley, D. F. Peterson,
36 John B. Thompson, J. B. Girard, Frank Downer, twelve good
and lawful men, and they are duly selected and tried, impaneled and sworn to well and truly try the issues herein joined and a true verdict render according to the evidence.

And the said jurors, having heard the evidence produced herein and the instructions of the court, upon their oaths do say they find for the plaintiff in this action, and that the plaintiff has title in fee simple in and to the premises described in the complaint in this action and is entitled to the possession of the same.

And afterwards and on, to wit, the 8th day of July, A. D. 1890, the same being one of the regular juridical days of the May term, A. D. 1890, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Motion for New Trial Denied.

THE SLIDE AND SPUR GOLD MINES, LIMITED, *vs.* J. FENTON SEYMOUR.	2475. Action for Possession of Specific Real Property and for Damages.

At this day comes the said plaintiff, by L. S. Dixon, Esq., its attorney, and the said defendant, by Willard Teller, Esq., his attorney, also comes.

And the motion for a new trial herein coming on now to be heard is argued by counsel and, the court being now sufficiently advised in the premises, it is ordered by the court, for good and sufficient reasons to the court appearing, that the said motion be denied.

Wherefore it is considered by the court that judgment be entered upon the verdict of the jury herein in favor of the said plaintiff and against the said defendant for possession of the 37 premises in the said complaint described and for the said plaintiff's costs to be taxed.

And day until thirty days from this day is allowed the said defendant within which time to file a bill of the exceptions reserved by him upon the trial of the issues herein joined.

And thereupon and on the same day, to wit, the 8th day of July, A. D. 1890, judgment was duly entered against the said defendant in the judgment book of said court, in pursuance of the statutes and rules of court, in words and figures as follows, to wit:

Judgment.

THE SLIDE AND SPUR GOLD MINES, LIMITED, *vs.* J. FENTON SEYMOUR.	2475. Action for Possession of Specific Real Property and for Damages.

On this 8th day of July, A. D. 1890, the same being one of the regular juridical days of the May term, A. D. 1890, of said court, there being present the Honorable Moses Hallett, district judge—

It is considered by the court that the said plaintiff do have and recover of and from the said defendant possession of the premises, lands, and tenements in said complaint mentioned, to wit:

The Slide lode or mine, being fifteen hundred feet in length and one hundred and fifty feet in width, and also the Spur lode or mine, being thirteen hundred feet in length and one hundred and fifty feet in width, together with all shafts, levels, and other workings upon and connected with said lodes or mines; also the shaft and engine house, the ore-house and blacksmith shop, and all other buildings and improvements thereon in Gold Hill mining district.

38 Also of lots numbered seven (7) and eight (8), in block numbered seven (7), in the town of Gold Hill, all in the county of Boulder and State of Colorado, and that it have a writ of possession therefor.

It is further considered by the court that the said plaintiff do have and recover of and from the said defendant its costs by it in this behalf laid out and expended, to be taxed, and have execution therefor.

And afterwards and on, to wit, the 9th day of July, A. D. 1889, the same being one of the regular juridical days of the May term, A. D. 1890, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Supersedeas Bond, $5,000.

THE SLIDE AND SPUR GOLD MINES, LIMITED, *vs.* J. FENTON SEYMOUR.	2475. Action for Possession of Specific Real Property and for Damages.

At this day comes the said plaintiff, by L. S. Dixon, Esq., its attorney, and the said defendant, by Willard Teller, Esq., his attorney, also comes.

And thereupon it is ordered by the court that supersedeas bond, upon writ of error herein, be in the sum of five thousand dollars ($5,000.00).

And afterwards and on, to wit, the 19th day of July, A. D. 1890, came again the said defendant by his attorneys aforesaid and filed in said court and in said cause his bill of the exceptions reserved by him upon the trial of the issues herein joined.

And the said bill of exceptions is in words and figures as follows, to wit:

In the Circuit Court of the United States, District of Colorado.

THE SLIDE AND SPUR GOLD MINES (LIMITED),
a Corporation, Plaintiff,
vs.
J. FENTON SEYMOUR, Defendant.
} Bill of Exceptions.

Be it remembered that on this 28th day of June, 1890, this cause coming on for trial before the court and a jury, the plaintiff, to maintain the issues on its part, offered in evidence the answer of the defendant filed herein, which is in the words and figures following, to wit:

Now comes the said defendant, and in answer to the said plaintiff's complaint says that as to whether the said plaintiff is a corporation organized and existing under the laws of the United States this defendant has not and cannot obtain sufficient information upon which to base a belief, and he therefore denies that it is such a corporation, and denies that it is or ever has been authorized to do business within this State.

This defendant, further answering, denies that the said plaintiff was at the time of the bringing of this action or at any other time seized in fee or seized in any way of the premises mentioned in the said complaint or any part or portion thereof, and denies that this defendant ever wrongfully ousted the said plaintiff from said premises, or that he now does or ever has wrongfully withheld or does wrongfully withhold said premises or any part thereof from said plaintiff; and further denies that said plaintiff was at the time the said suit was brought or at any time before or since suit was brought or is now entitled to the possession of said premises or any part or portion thereof; and further denies that said plaintiff has ever been in the possession of any part or portion of said premises.

And for further and separate defense the said defendant says *actio non*, because he says that heretofore, to wit, on the 19th day of October, 1886, the said property mentioned in the complaint was held and possessed by Ellen R. Seymour and William G. Pell, then and now citizens of the United States and of the State of Colorado, and upon that day one John Haldeman, of the city of London, England, made application to the said Ellen R. Seymour and William G. Pell to purchase said premises; and thereupon said last-mentioned Seymour and Pell, acting by this defendant and A. B. Davis, made a proposition in writing to the said Haldeman, which is in words and figures following, to wit:

"DEAR SIR: I agree that in case you cannot raise the required sum within the specified time in your contract, dated about the 9th day of October, between W. F. Bruff, acting under our authority, and yourself, to change the conditions as follows, viz: To sell you the Slide mine for $750,000—25 M *thousand* dollars to

40

be paid one week after the receipt in London of Foster's report, this to be the first payment on the property; the balance of the purchase price, $725,000, to be paid within two months from the date of the payment of $25 M, one ½ in cash and one-half in fully paid common shares of the company to be formed. In case the second and last payment is not made when due, the agreement cancels itself and the $25 M is forfeited. No ore to be taken from the mine after first payment. I further agree to give you a call at par for two months from date of issue upon the shares received as part payment for the property.

(Signed) I. F. SEYMOUR.
A. B. DAVIS."

That thereupon and on the 16th day of May, 1887, the said Haldeman made and entered into an agreement in writing with one Harry Edward Gilbert, which was in words and figures following, to wit:

"An agreement, made this sixteenth day of May one thousand eight hundred and eighty-seven, between John Haldeman of 38 Old Jewry in the city of London gentleman (hereinafter called the vendor) of the one part and Harry Edward Gilbert of 12 Holford road, Richmond Surrey, gentleman, (but without personal responsibility) for and on behalf of a company intended to be incorporated under the limited liabilities companies acts one thousand eight hundred and sixty-two to one thousand eight hundred and eighty-three under the name of The Slide and Spur Gold Mines Limited (hereinafter called the company) of the other part;

Whereas the vendor is the beneficial owner of the mining properties known as the Slide and Spur mines situated in the Gold Hill mining district, Boulder county, Colorado, United States — America, and of certain timbered lands situate in the same place more fully described in the report of Mr. Edward O. Wolcott dated the 14th day of January one thousand eight hundred and eighty-seven and the plan therewith, a copy of which report and plan is attached hereto;

And whereas the vendor is desirous that a company should be incorporated under the companies acts one thousand eight hundred and sixty-two to one thousand eight hundred and eighty-three for the purpose of purchasing, developing and working the said properties being the company for and on behalf of which the said Harry Edward Gilbert joins in this agreement;

Now it is hereby agreed as follows:—

1. The company shall be incorporated within one calendar month from the date hereof and the nominal capital of the company shall be four hundred thousand pounds divided into four hundred thousand shares of one pound each.

2. The vendor shall sell to the said Harry Edward Gilbert for and on behalf of the said company when formed the said properties, and also all *that* the ore which has been raised since April one thousand eight hundred and eighty-six, with the exception of one hundred and seventy-three and a half tons reported to have been

sold, and all rights and benefits appertaining thereto, and all the share estate right title and interest of the vendor therein, free from all incumbrances. And the vendor hereby undertakes with
the said Harry Edward Gilbert that the same are now abso-
41 lutely free from incumbrances, and shall at the expense of
the company cause the same to be duly conveyed to and vested in the said company, the company, (at their own expense) to be duly registered as the proprietors of the properties on the completion of the purchase for the sum of three hundred and seventy-five thousand pounds (£375,000 0 0) that is to say, as to eighty-five thousand pounds (£85,000 0 0) in cash within fourteen days after the first allotment of shares, or as soon thereafter as may be agreed on, and upon the property, free from incumbrances becoming to the satisfaction of the said company or its legal advisers vested in the said company, or as it may direct, under a good and perfect title, and as to one hundred and thirty-three thousand pounds (£133,000 0 0) in fully paid-up shares of the company of one pound each numbered from one to one hundred and thirty-three thousand both inclusive and as to the balance of one hundred and fifty-seven thousand pounds (£157,000 0 0) in cash or fully paid-up shares, or part in cash or part in shares at the option of the directors of the said company. Provided always and it is hereby agreed that all such fully paid shares or part thereof as hereinbefore mentioned shall be allotted as fully paid shares to the vendor or his nominees within one calendar month after the first allotment of shares, and provided the property shall then be vested in the company or otherwise as hereinbefore provided. Provided always and it is hereby agreed that the company in making cash payments to the vendor shall reserve out of the shares subscribed for a minimum of five thousand (5,000) shares towards providing working capital.

3. The memorandum and articles of association and the prospectus shall be submitted to the vendor for his approval before issue.

4. The vendor shall give to the proposed company all the necessary information and assistance for the formation of the same and for the carrying on of its intended operations.

5. The vendor will discharge all payments and claims for commissions, negotiations, services, brokerages, advertising, printing, legal, engineers' reports, and other expenses preliminary or otherwise up to the time of the first allotment of shares and the vendor shall indemnify the company and the directors thereof from and against all proceedings, claims and demands in respect of the said preliminary expenses, but the vendor shall be at liberty to make any arrangements with agents or others, under this clause, for providing said expenses, so that such arrangements do not involve any liability on the company.

6. On the adoption of this agreement, with or without modification, by the company, the said Harry Edward Gilbert shall be discharged from all responsibility, and if the company so require, a fresh agreement shall be entered into between the vendor and the

company in the same terms as this agreement and in substitution therefor.

7. Any dispute or difference which may arise touching these presents or any matter or thing arising thereunder or in connection with shall be referred to arbitration in the usual way as provided by the common-law procedure act one thousand eight hundred and fifty-four.

As witness the hands of the said parties on the day and year first above written.

(Signed) JNO. HALDEMAN.
HARRY EDWARD GILBERT.

Witness:
T. A. DENNISON,
Sol'r, 4 Eastcheap."

12 This defendant further says that after the giving of said option of October 19th, 1886, as above set forth, the said Haldeman accepted said option and paid in pursuance thereof the sum of fifty-eight thousand four hundred and forty-three and $\frac{50}{100}$ (58,443.50) dollars up to the 7th day of July, 1887, and no more; that afterwards, to wit, on the 18th day of August, 1887, the said Haldeman, not being able to comply with the terms of said option, obtained from said Ellen R. Seymour and William G. Pell another contract, which said contract was in words and figures as follows, to wit:

Memorandum of agreement made this eighteenth day of August, 1887 between John Haldeman of 38 Old Jewry in the city of London and J. Fenton Seymour of Denver, Colorado in the United States of America acting for himself and partners the owners of the Slide and Spur gold mines situate in Boulder county Colorado United States of America the said John Haldeman agrees to pay forthwith the sum of ten thousand pounds sterling in addition to twelve thousand five hundred pounds already paid on account of the purchase-money of the said mines such sum of ten thousand pounds to be paid through Messrs. Wells Fargo & Co. (who now hold the deeds of the said property in escrow) and to be held by them and paid over to the said J. Fenton Seymour upon the titles of the said mines being registered in the name of the "Slide and Spur Gold Mines" Limited free from all charges and incumbrances and the said J. Fenton Seymour hereby undertakes and agrees to register the titles as above upon the said ten thousand pounds being deposited with Messrs. Wells Fargo & Co.

The said J. Fenton Seymour hereby undertakes and agrees to have the Slide mine worked to its full capacity and after the due and legal registration of the title to the said company he further agrees that the returns from the said mine shall be cabled weekly to the said company in the form of cables sent herewith, it being understood and agreed that the money value of the first weekly return so cabled shall not be less than the sum of two hundred pounds sterling and that each successive weekly return shall show a moderate increase over that sum.

The said J. Fenton Seymour hereby undertakes and agrees to take the control of the management of the said property until the payments hereinafter mentioned are completed, and it is understood and agreed that he shall retain such control until the said payments are completed. The said John Haldemand agrees that three hundred and seventy-five thousand shares of one pound each in the above company shall be transferred to Mr. Clarence Preston Elder as trustee and deposited with Messrs. Wells Fargo & Co. in London to the intent that the said shares shall be held as security for the due performance of the following conditions viz:—

1st. The payment of ten thousand pounds in addition to the above-mentioned twenty-two thousand (J. F. S.) five hundred pounds within three days (J. F. S.) after the receipt of the third successive weekly return from the mine as hereinbefore mentioned and

2nd. The balance of forty-five thousand pounds at the expiration of ten days after the receipt of eight successive weekly returns of the nature and value above specified. Upon the completion of the above-mentioned payments the said J. Fenton Seymour hereby undertakes and agrees to release the above-mentioned three hundred and seventy-five thousand shares less seventy-seven thousand five hundred to which he is entitled, and also less the number of
shares sold with the consent and under the supervision of
43 . the aforesaid Clarence Preston Elder acting for the said J.
Fenton Seymour.

In case the weekly returns called from the mine shall from any cause fall below the sum of two hundred pounds sterling per week then in that case such returns shall not count but the time for paying the second ten thousand pounds and the balance of forty-five thousand pounds shall be extended *pro rata*, but should the successive weekly returns amount to two hundred pounds sterling (per week J. F. S.) with a moderate increase weekly as hereinbefore mentioned and the said John Haldeman shall make default in the payment of the balance of forty-five thousand pounds then in that case the said J. Fenton Seymour shall have the right to forfeit the amounts already paid and to claim the above-mentioned three hundred and seventy-five thousand shares.

As witness the hands of the said parties the day and date first above written

(Signed) J. FENTON SEYMOUR.
JNO. HALDEMAN.

The following endorsements appear upon the back of said agreement: "Agreement. John Haldeman & J. Fenton Seymour. State of Colorado, county of Boulder, *ss:* I hereby certify that this instrument was filed for record in my office this 18 day of Dec., A. D. 1887, at 10.10 o'clock a. m., and is duly recorded in Book 121, on page 139. James Cowie, recorder, by —— ——, deputy. No. 3115. Fees, $1.75."

This defendant further says that in making said contract he was acting for and in behalf of the owners of said property, Ellen R. Seymour and William G. Pell, and as their agent, which fact

was well known to the said John Haldeman, and that the said Haldeman was at the time of the making of said contract one of the board of directors of the said plaintiff herein, and was acting manager of its business, and was the only officer of said company acting for said company, and that the said plaintiff had full knowledge at that time and ever since of the said contract of the said Haldeman, and that the said Haldeman was not the owner of the same and had not paid for the same, and that the said contract was made for the benefit of the said plaintiff and the said Haldeman and only to enable the said plaintiff to issue stock, which it could not do until the legal title to said mine was in the said company, the plaintiff herein, and that it was then and there fully understood and agreed that this defendant should remain in the full, entire, and complete possession of the property and should be entitled to remain in such possession until the purchase price for said property had been fully paid to the owners, and that
44 such *defendant* should be held by the defendant for and his possession should be the possession of the said owners as well as his own.

This defendant further shows that immediately upon the execution of said last-mentioned contract the same was laid before the said plaintiff, and before the said contract had been executed by registration of the said deeds mentioned in the said contract; which registration occurred on the 6th day of September, A. D. 1887.

This defendant, further answering, says that no delivery of the deeds to *be* said property ever was made or agreed to be made to the said Haldeman or to the plaintiff or to any person for them or either of them. This defendant further says that, by agreement originally made with the said Haldeman, the deeds were to be made and when made were to run to the said Haldeman as grantee, but that, at the said Haldeman's request, said Haldeman acting both for himself and for the said plaintiff and as its agent, the name of the grantee was changed and the name of the plaintiff inserted as the grantee, and that said change was made at the time of the making of said contract of August 18th, 1887.

This defendant further says that on the 10th day of September, 1887, the said Haldeman, acting for himself, and also acting as one of the directors of said plaintiff, made and entered into an agreement with the said plaintiff; which said agreement was in words and figures following, to wit:

"An agreement made the tenth day of September, one thousand eight hundred and eighty-seven, between the Slide and Spur Gold Mines, Limited, hereinafter called the company, of the first part; John Haldeman, of 38 Old Jewry, in the city of London, gentleman, of the second part, and Harry Edward Gilbert, of 12 Holford road, Richmond, Surrey, gentleman, of the third part.

"Whereas by an agreement dated the sixteenth May one thousand eight hundred and eighty-seven and made between the said

John Haldeman of the first part and the said Harry Edward Gilbert for and on behalf of the company then intended to be and which has since been formed under the companies acts 1862 to 1886 of the other part the said John Haldeman agreed to sell and the said company to purchase certain mines and property in the said agreement described, upon the terms and subject to the stipulations and conditions therein contained:

"Now these presents witness and it is hereby agreed as follows:

"1. The said recited agreement is hereby subject to the modifications thereof hereinafter contained, adopted by and shall subject to such modifications, be binding on the company and on the said John Haldeman in the same manner and be read and construed in all respects as if the company had been in existence at the date thereof and had been party thereto instead of the said Harry Edward Gilbert.

"2. Clause 2 of the said agreement shall be cancelled and the following clause shall be substituted in lieu thereof, viz: The said John Haldeman shall sell to the said company the said lands mines and properties referred to in the said agreement of the sixteenth day of May one thousand eight hundred and eighty-seven and the freehold thereof free from all incumbrances and liabilities whatsoever and also all *that* the ore which has been raised since April one thousand eight hundred and eighty-six with the exception of one hundred and seventy-three and a half tons reported to have 45 been sold, and all water and other rights easements benefits and appurtenances belonging or appertaining thereto, and all the estate right title and interest of the said John Haldeman therein, and also all machinery plant and effects live and dead stock on or belonging to the same or any part thereof, free from all incumbrances and liabilities whatsoever, and the said John Haldeman shall make out and show to the satisfaction of the said company or such person as they may appoint a perfect complete and indisputable title to the said lands and premises, free from all incumbrances and liabilities whatsoever, according to the laws in force in Colorado in the United States of America, who shall certify that the said title is free and unincumbered, and that the said John Haldeman has full right and power to sell the same to the said company freed from all incumbrances and liabilities whatsoever, but subject to any Government taxes charges or impositions which shall be properly payable by the said company for the purpose of vesting and registering the said properties in the said company. And the said John Haldeman shall at the expense of the company execute and procure to be executed all deeds and documents and do and procure to be done all acts and things which the directors may be advised to be necessary for vesting the said mines and premises in the company as aforesaid, and at their expense for procuring the registration of the company as the proprietors and owners of the said mines and premises according to the customs and laws of Colorado aforesaid at the time applicable to the district where the said mines are situate, for and in consideration of the absolute allotment to him of three hundred and seventy-five thousand one pound fully paid shares in the said company, the said shares to be allotted to the said John Haldeman or his nominees as soon as the directors shall have been satisfied that the said mines and property as aforesaid have been transferred to the company free from all incumbrances and liabilities whatsoever, that the deeds of transfer have been duly registered and recorded in the office of the county clerk and recorder of Boulder county in the State of Colorado, in the United States of America, and that the company has been put and is in absolute working possession of the property as aforesaid, with such good perfect free indisputable and unincumbered title as aforesaid. Provided always and it is hereby agreed that all such fully paid shares or part thereof as hereinbefore mentioned shall be allotted as fully paid shares to the said John Haldeman or his nominees without any further liability of any kind whatsoever attaching thereto.

"The said Harry Edward Gilbert shall henceforth be discharged and freed from all liabilities and obligations whatsoever incurred by him under the said agreement of the sixteenth day of May one thousand eight hundred and eighty-seven in the same manner as if he had not been a party to that agreement.

"In witness whereof the parties hereto of the second and third parts have hereunto set their hands and the party of the first part have caused the common seal to be hereunto affixed in the presence of two directors the day and year first above written.

"Directors R. M. N. KERRELL, of Hillhouse.
"J. KEATINGE POLLOCK.
"G. W. HUTCHINSON, *Secretary.* { SEAL OF THE COMPANY. }
"JNO. HALDEMAN.
"H. E. GILBERT.

"Witness to all the above signatures:
"LIONEL BLUGLEY,
"4 *Eastcheap, E. C., Sol'r.*"

This defendant further shows that he is informed and believes, and so charges the fact to be, that the said plaintiff, at the request of the said Haldeman and for his benefit, caused three hundred and seventy-five thousand (375,000) shares of the capital stock of said company, four hundred thousand (400,000) shares being the whole of the capital stock of said company, to be issued to the said Haldeman; that such stock was issued without being subscribed for by any person and without any payment by any person whatever of any sum whatever, and was never received by the said defendant nor said Ellen R. Seymour and William G. Pell or either of them in payment of any sum whatever upon the purchase-money of said property in any sum whatever. 46

This defendant further says that afterwards and while this defendant was in the full, exclusive, and undisputed possession and control of said premises mentioned in the said complaint for the said Ellen R. Seymour and William G. Pell, and while he was thus acting as their agent and holding possession and control for them and for them only, in accordance with the said agreement of

August 18th, 1887, which said agreement was not only known to the said plaintiff at the time of the making thereof, but was made the basis of all its subsequent action in respect to the issue of stock, &c., as above stated, the said Haldeman, still acting for himself and also as one of the members of the board of directors of the said plaintiff and as the agent of the said plaintiff, finding himself unable to comply with the terms of the said contract of August 18th, 1887, though the said defendant and the said Ellen R. Seymour and William G. Pell had fully complied with the terms of the said contract on the part of each and all of them, and the said Haldeman having paid on said contract of August 18th, 1887, forty-eight thousand three hundred and ten (48,310) dollars only, the said John Haldeman, acting for himself, and also acting for the said plaintiff as its agent, and then and there being a member of its board of directors, made and entered into another agreement in writing with this defendant, acting for and in the interest of and as the agent of the said Ellen R. Seymour and William G. Pell, which said agreement bore the date of October 5th, 1888, and was to the effect that, upon the payment to them of the sum of three thousand five hundred pounds sterling, as part of the said purchase-money for the said property, they, the said Ellen R. Seymour, William G. Pell, and this defendant, would start the working of said mine under the control and for the credit of this defendant, and that the said plaintiff might, if it saw fit, send from England a cashier and engineer, and that this defendant should be made a director and resident manager of the company for the period of one year; that the proceeds were to be transmitted to the company's bankers, and that Clarence P. Elder, who was then holding the three hundred and seventy-five thousand (375,000) shares of the company's stock, might deliver seventy-five thousand (75,000) shares of such stock to certain parties, who had subscribed and paid for certain stock of said company and who were known as the "Scotch subscribers," and to one Rust forty-five thousand (45,000) shares of said stock on the payment by said Rust of the sum subscribed by him for said stock, and that the balance of said stock so placed in said Elder's hands should remain in his hands until a final settlement could be made of the amount due upon the purchase price of said premises mentioned in the complaint, and that such settlement should be made within three months from the date of the execution of said contract; and, further, that whoever should pay in cash the said three thousand five hundred (3,500) pounds sterling mentioned in said contract should be entitled to receive from said Elder fifteen thousand (15,000) shares of said stock on the final settlement, as
above stated; and thereupon and afterwards, to wit, on the
47 15th day of December, 1888, said sum of three thousand five
hundred (3,500) pounds sterling, or seventeen thousand forty-
five (17,045) dollars, was paid to this defendant for the said Ellen R. Seymour and William G. Pell.

And this defendant further says that he did afterwards, and immediately upon the payment of the said sum of three thousand five hundred (3,500) pounds sterling, cause the said mine to be worked in accordance with the terms of said contract, and did transmit all the proceeds of said mine to the company bankers as provided for in said contract; and the said Elder did, in pursuance of the consent and release of said stock in said last-mentioned contract by the defendant, deliver to the said Scotch subscribers the said seventy-five thousand (75,000) shares and to the said Rust the said forty-five thousand (45,000) shares and to one Wilson the said fifteen thousand (15,000) shares mentioned therein, and this defendant avers that he did, both for himself and for the said Ellen R. Seymour and William G. Pell, do and perform all and every act or thing required by said contract of August 18th, 1887, and of October 5th, 1888, to be done and performed.

This defendant further says that the capital stock of plaintiff was and is fixed at four hundred thousand (400,000) shares of one (1) pound sterling each, no part of which has ever been paid into said company in money or property, except that said company pretends that it issued the three hundred and seventy-five thousand (375,000) shares of said stock to the said Haldeman in exchange for the title to the premises mentioned in the complaint; but this defendant denies that it was thus issued in exchange for stock, but avers that such issue was made by said company with full and complete knowledge of the fact that said Haldeman had no title to said property, and that no complete or perfect title could or would pass to him or to any person designated by him until the purchase price for said property had been fully paid, and that it was expressly agreed by and between the said Haldeman and the said plaintiff and the owners of the said premises, to wit, Ellen R. Seymour and William G. Pell, and also with this defendant, that said deeds to said premises were procured to be registered and recorded by this defendant for the sole and only purpose of enabling the said plaintiff to obtain subscriptions to and issue the stock of the said company plaintiff, and that this defendant should hold the possession of said premises for the vendors mentioned in said deed until the purchase-money should be fully paid, and that the said contract or proposition offered by the vendors by and through this defendant, and being of date the 5th day of October, 1888, was to affect the status and condition of said property and defendant's right to redeem possession thereof only as therein expressed, to wit, in respect to working the property and transmitting the proceeds, and this defendant avers that the said contract of August 18th, 1887, under which the deeds were registered and under and by virtue of which this defendant went into possession of said property with the right to hold possession of the same until the purchase price for said property should be paid in full, is still in force and has never at any time been cancelled, annulled, released, or discharged in any respect so far as it relates to the possession of said premises and the right to remain in the possession thereof; and this defendant further avers that the said plaintiff has at no time ever been in possession of the said premises, nor has it at any time ever been entitled to the possession of the same; that no delivery of the deeds to said property has ever

been made to the said plaintiff, nor has any delivery of the possession of said property or of said property ever been made to the
said plaintiff or to any person for it, nor has there ever been
48 any agreement whatever on the part of anybody to deliver
possession thereof until the purchase price had been paid in
full, which said price has not been paid in full or otherwise except as above stated.

(Signed) TELLER & ORAHOOD,
Att'ys for D'f't.

And the plaintiff further introduced in support of its claim the deposition of the defendant, J. Fenton Seymour, which said deposition was taken in the month of June, 1889, before Andrew W. Brazee, examiner in chancery, in a proceeding therein pending on the chancery side of the said court, which was entitled "The Slide and Spur Gold Mines (Limited) *vs.* J. Fenton Seymour, William H. Green, and Matthew J. Holt," the said proceeding being one instituted under the laws of the State of Colorado; which law is in words and figures following:

"The several district courts of the State or any judge thereof shall have, in addition to the power already possessed, power to issue writs of injunction for affirmative relief, having the force and effect of a writ of restitution, restoring any person or persons to the possession of any mining property or premises from which he or they may have been ousted by fraud, force, or violence, *of* from which he or they are kept out of possession by threats or by words or actions which may have a natural tendency to excite fear or apprehension of danger, or whenever such possession was taken from him or them by entry of the adverse party on Sunday or legal holiday, or while the party in possession was temporarily absent therefrom, the granting of such writ to extend only to the right of possession under the facts of the case in respect to the manner in which the possession was obtained, leaving the parties to their legal rights on all other questions as though no such writ had been issued: Provided, that no such writ shall issue except upon notice in writing to the adverse party, of at least five days, of the time and place of making such application, if made in vacation, and, if made in term time, not before defendant or defendants have been duly served with process and required to appear and answer by virtue of such service, and the defendant may resist such application upon affidavits alone; and if the defendant or defendants shall file an answer to the complaint upon which such application is founded, denying under oath the material averments in said complaint contained, the said court or judge thereof shall hear evidence in support of said complaint or answer or may cause the said application to be referred to a referee to take such proofs in support of said complaint and answer, and shall direct the said referee to report the proofs to the said court or judge within a reasonable time, allowing to the complainant and defendant a reasonable time in which to take proofs, and the time so allowed by said court or judge for the purpose of taking testimony shall be equally divided between

said complainant and defendant, and it shall be the duty
49 of the complainant or complainants to take his or her or
their testimony first, and the defendant or defendants shall proceed to take his, her, or their proof within the last half of said time allowed, and the said court or judge shall adjourn the hearing of said application until some day within reasonable time after the time of taking and completing of said proofs, and at such time, upon the hearing of said referee's report, shall grant or refuse said writ, as the pleadings and evidence in said cause or proceedings may warrant or require; and provided further, that no such writ shall issue in favor of any person or persons to restore to such person or persons possession of any mining property if the said person or persons shall have obtained *of* procured possession of said property by violence or by fraud or by taking possession of the same while the adverse party in possession was temporarily absent therefrom; and provided further, that appeal, as in other cases, shall be allowed from any final order or decree granting an injunction under the provisions of this section, but such appeal shall not have the effect to suspend the operation of said writ after an order or decree is made by the court or judge granting the same, nor to continue one in force after an order or decree is made dissolving any injunction pending the appeal. When application is made for such an injunction for affirmative relief as contemplated in this section, the court or judge shall, immediately on the filing of the complaint, allow a temporary injunction, as provided for in this act, upon the giving of the required undertaking."

And the said complainant therein averring that the said defendants therein named had kept the said complainant out of the possession of the said mining property mentioned in the complaint and the same property described in the complaint in this cause by threats or by words or actions which have a natural tendency to excite fear or apprehension of danger, and that the defendants had taken possession of the property while the said complainant, The Slide and Spur Gold Mines (Limited), was temporarily absent therefrom, the said defendants in said cause having answered with a denial of all the material allegations urged in said action; which said deposition is in the words and figures, to wit:

"Q. What is your name, age, residence, and occupation?

A. J. Fenton Seymour; residence, Denver; occupation, mining; fifty-six years.

Q. Do you know the Slide and Spur lode?

A. Yes, sir.

Q. How long have you known it?

A. About thirteen years—twelve or thirteen years, I guess.

Q. Do you know this complainant or what is alleged to be the Slide and Spur Gold Mining, Limited, Company?

50 A. Am I acquainted with the company?

Q. Yes, sir.

A. Yes, sir.

Q. State whether you were at any time employed as the manager of its business as resident director or in what capacity you were employed.

A. I am a director of the company and was appointed as managing director.

Q. State when you took charge of this property, if ever, as managing director—when you commenced.

A. Some time in December, as managing director, for the Slide and Spur Mining Company.

Q. December, 1888?

A. Yes, sir. It may have been the last of November, but I think it was December.

Q. Was there any other officer of the company here?

A. Yes, sir; the cashier, book-keeper.

Q. Who was the cashier?

A. George Woodgate Hutchinson.

Q. Did you work that mine for the company during the winter; and, if so, with how many men?

A. I worked men getting the water out and retimbering, and I put men in the shaft to work developing the mine—the west drift from the ninety-foot level. I never could tell the number of men working there, because Mr. Hutchinson kept the books in his house, but it was from seven to nine men, somewhere along there. I don't remember how many men I had now.

Q. From the time you went in as managing director till this time has there been any change of possession or of the circumstances under which that property was held at any time?

A. No, sir.

Q. Under what contract or arrangement did you go into possession of that property to manage it?

A. You mean for the company?

Q. Yes, sir.

A. I was in possession of the property personally before I worked on the property for the company. It was under a proposition I made them in October, 1888, in Paris. I was a director of the company at that time.

(By Mr. Dixon:)

Q. *What w*hat proposition in writing?

A. Yes, sir.

Q. Have you a copy of it?

A. Yes, sir.

Q. Let me have it.

A. (Witness produces written paper.)

Q. Is this the proposition under which you went in as managing director—is this a copy of it?

A. That's a copy of it.

Q. Was this proposition accepted by the company?

A. Yes, sir.

The paper identified by witness is marked Exhibit '3' and hereto attached.

Q. That was in December some time when you took possession under that?

A. Yes, sir; some time in December.

Q. 1888?

A. Yes, sir; I think it was in December. It may have been the last of November. I don't remember.

Q. Has the company remained in possession—the same possession you took—up to this time?

A. It has.

Q. Has there been any change in respect to the possession?

A. No- on my part.

Q. On anybody's part?

A. No, sir.

Q. You may state when you first heard of the fact that Mr. Hutchinson was to be or claimed to be acting as manager of this company's concerns or whatever he claimed to be.

A. It was somewhere about the first of May, the date I do not know, that the paper was served on me.

Q. Was it or was it not after he had been up at the mine to talk with the men there on the 27th of April?

A. It was afterwards. It was mailed to me by Judge Dixon. I cannot find the envelope to get the date of it.

51 Mr. Dixon: You are mistaken about the date.

A. It was not served upon me until after Mr. Hutchinson had been up there and demanded possession of the property.

Mr. Dixon: I think it was about the middle of April.

Q. When did Mr. Hutchinson make a personal demand upon you?

A. He never has made any.

Q. Not up to this time?

A. No, sir.

Q. Tell how you are holding that property at this time; how you were holding it at the time this proceeding was instituted.

A. I am holding it in the same way.

Q. The same as you did all along?

A. Yes, sir.

Q. For the company?

A. Yes, sir.

Q. As managing director?

A. Yes, sir.

Q. Have you been furnished at any time with any proofs of the action of the board in attempting to remove you?

A. Yes, sir.

Q. When?

A. Some time about the first of May.

Q. By whom?

A. By mail.

Q. What was the proof he furnished you?

A. It was a copy of the proceedings of the company.

Q. What was alleged to be a copy?

A. Yes, sir; I think it was only a copy; I am not positive.
Q. Have you got it with you?
A. I think I have.
Q. Was it left with you?
A. Yes, sir.

(Paper shown.)

Q. This is the instrument, is it?
A. Yes, sir.

It is admitted that this paper is a duplicate of Exhibit No. 1.

Q. Has there been anything demanded of you, any other demand made of you, other than the presentation of this paper?
A. No, sir.
Q. Since that time have you or has the company been temporarily absent from the property?
A. No, sir; it has been under my control all the time as managing director and as manager of the property.
Q. As an employé of the company?
A. Yes, sir.
Q. Have you had for the company in this way possession of the property since that time?
A. Yes, sir.
Q. Do you hold it now in the same manner that you held it heretofore?
A. Yes, sir.
Q. State what instructions you gave to Mr. Holt and Mr. Green, if any, in respect to retaining possession of the property.
A. The instructions given to Mr. Holt, if I remember right, were simply these: That he was to recognize nobody as manager but me, for there never was any manager of the property except myself before Mr. Nicholson left. Before Mr. Nicholson left all the instructions were given to him. I had no conversation with Mr. Holt at all.
Q. Before Nicholson left he was the foreman and your instructions were given to him?
A. Yes, sir.
Q. When did Mr. Nicholson leave?
A. I think it was about the first of April. About the time we got the water all out and had it all ready and the mine in good shape to work and were going to put the men in the bottom of the shaft to mine, I got a letter from Mr. Nicholson saying the men would not go to work for two dollars and fifty cents a day, and that was all we had been paying them. They demanded three dollars a day, and said unless they got three dollars a day they would quit work. I immediately wrote Mr. Nicholson to hold the men together until I could go up and see what arrangement we could make in connection with the sinking of the shaft, and at that time we were developing and working the mine at the same time. The
52 next time I went up I think there were only three men working.

Q. What time was that?

A. I think it was some time in April. I don't remember the exact date.

Q. Did you have notice of any charged preferred against you, or that you were to be dismissed from the employment of the company?

A. I had no notice. I had intimations coming from two or three other sources.

Q. But none from the company itself?

A. No, sir.

Q. You were not notified to appear or anything of that kind?

A. No, sir.

Q. Do you then still hold possession of this property under the circumstances you have stated?

A. Yes, sir; I have tried to.

Q. The question, then, is between yourself and Mr. Hutchinson as to who is the manager?

A. I do not think there is any question about it at all. I do not understand that he has got any power to displace me.

Q. That is the dispute, then?

A. Yes, sir.

Q. Have you at any time denied the right of the company to the possession of the property?

A. No, sir.

Q. Did you have any notice of this meeting of the directors that took place on the 27th of March?

A. No, sir; only what I have showed.

Q. I mean before it occurred?

A. No, sir; I had no notice.

Q. How many directors are there?

A. Five.

Q. How many of them reside in the United States?

A. Two.

Q. Who are they?

—. Clarence P. Elder and J. Fenton Seymour.

Q. Was Mr. Elder residing here in March?

A. Yes, sir.

On the cross-examination of J. Fenton Seymour by Mr. Dixon, of counsel for complainant, he testified as follows:

Q. You say you went into possession as managing director in December?

A. The last of November or in December.

Q. As managing director?

A. Yes, sir.

Q. Then you took control as manager?

A. Yes, sir; I was a director previous to that.

Q. Did you correspond with the company at that time?

A. I had none.

Q. When was the last correspondence you had with the company?

A. I never had any at all.

Q. You never had any?

A. No, sir.

Q. None at all?

—. No, sir; not since I left there.

Q. When did you leave there?

A. In October last.

Q. You say you have been engaged in driving the fifty-foot level and keeping the water out?

A. The ninety-foot level.

Q. How often did you visit the mine since you have been in possession as manager?

A. About once a week; sometimes twice a week, until lately I have not been up there so often. I was away two weeks sick, and was not there.

Q. Have you been there as often as once a week?

A. I do not know that it would average once a week.

Q. When were you last up there?

A. Last week.

Q. When before that?

A. The week before—no; I was not there last week. I was up there the week before.

Q. When were you up there before that time?

A. The week before.

Q. Have you been shipping any ore from the mine since you have been manager?

A. Yes, sir.

Q. When did you do that?

A. I cannot tell the date. It was along, I should say, about the first of March or the last of February—somewhere along there.

53 Q. Did you ship and sell it?

A. Yes, sir.

Q. For whom?

A. The Slide and Spur Mining Company, Limited.

Q. Who received the proceeds?

A. The cashier of the company.

Q. Mr. Hutchinson?

A. Yes, sir.

Q. Has the company had an engineer in its employment?

A. No, sir.

Q. Has not?

A. Not here.

Q. How do you know?

A. I do not know of any.

Q. Has not Mr. Farrish been employed as a mining engineer?

A. Not to my knowledge. I believe Mr. Farrish was engaged to visit the mine once to make a report.

Q. Have you not been notified that Mr. Farrish was employed as engineer?

A. No, sir.

Q. Never have?

A. No, sir.

Q. Did you ever refuse to allow Mr. Farrish to enter the mine?

A. Yes, sir.

Q. What was the reason?

A. On account of the fact that the ground was not opened up. At the time I took possession of the mine it was full of water, and he came before the water was taken out. I say I refused, but my refusal was in this way: Mr. Elder, the other director, told me that they would like to have Mr. Farrish make a report on the mine, and I says, It will be impossible for him to make a report now, by reason of the water. He could not get into the mine or go through it, and I want him to wait — I can get it in proper shape and then Mr. Farrish can make a report. They asked if I had any objection to his going to the mine, and I told them no, and I arranged for two days to go up there with Mr. Farrish, but I was taken sick. It was agreed between myself and Elder that he should not go into the mine until the water was taken out.

Q. That was the agreement between Mr. Elder and yourself?

A. Yes, sir.

Q. What agreement did you have with Mr. Hutchinson?

A. He was the book-keeper and cashier.

Q. Did you not have anything to do with him?

A. Yes; he had the right to go back and forth until he went up there clandestinely to talk with the men. He had every privilege a man could have, but as far as instructions were concerned nobody else was to give any instructions but myself.

By Mr. TELLER:

Q. He had no business there at all; his place was in the office?

A. He went up there several times and undertook to tell the men what to do about shipping ore. I told them that Mr. Hutchinson had no authority whatever in regard to running the mine, and that he must not give any orders about running the mine.

Q. You told the men so?

A. I told Hutchinson.

Q. You told the men?

A. Yes; I told him so.

Q. When did you give the men those instructions?

A. After we commenced driving the level, he commenced telling what he was going to do; that he was going to ship ore so and so, as though he was running the mine.

Defendant here objects specially.

Q. Before or after this?

A. Before—before we shipped any ore.

Q. Have you at any time refused to ship ore from that mine, or said you would not have it shipped anywhere?

A. Mr. Hutchinson at one time got instructions from the other side to ship a car-load of ore to New York and have it experimented on, but I told him at the time that I could not ship ore on that

kind of an order; that if they had any instructions to give
54 I was the managing director; that when I received such
instructions I would consider whether I would ship the ore; that with orders that came to him and not to me I would not have anything to do with under any circumstances, and that was why I refused.

Q. Did you refuse to ship otherwise?

A. I never had any request to ship any ore.

Q. Did you have any conversation with Mr. Elder about shipping this ore to New York?

A. I do not think I had; my impression is I had no conversation with Mr. Elder about shipping ore at all; if I had I made the same answer that I did to Mr. Hutchinson.

Defendant rests.
(Signed) J. FENTON SEYMOUR.

Subscribed and sworn to before me this 18th day of June, 1889.
(Signed) ANDREW W. BRAZEE,
Examiner in Chancery.

EXHIBIT 3, A. W. B.

Heads of Agreement Signed by Col. Seymour.

PARIS, *Oct. 15th*, 1888.

1st. On payment of £3,500 to Wells, Fargo & Co., we agree to start the mine at work in the name of Co., said sum to cr. of Col. Seymour.

2d. Company to send cashier and engineer (if they think fit), & Col. Seymour to be resident manager and director for the period of one year.

3d. All proceeds to be transmitted to company bankers.

4th. Mr. Elder to deliver 75,000 shares to the Scotch subscribers and 45,000 to Mr. Rust on payment of said sum.

5th. The balance of shares to remain in Mr. Elder's hands, as trustee, until a final settlement can be made inside of three months after acceptance of this proposition.

6th. Col. Wilson, or whoever pays the £3,500, to receive 15,000 shares from Mr. Elder on the final settlement (not later than three months), and meantime receive a legal obligation from Mr. Elder as trustee.

7th. On resignation of Mr. Elder as a director, Mr. Allen to be elected.

8th. £3,500 to be paid as soon as the company can register the transfer of the 75,000 shares.

Dec. 10.
(Signed) J. F. SEYMOUR."

And thereupon the plaintiff rested, and this was all the evidence offered by the plaintiff.

And thereupon the said defendant announced that he would offer no evidence and would submit the case by asking the court to instruct the jury that there was not sufficient evidence to warrant them in finding a verdict for the plaintiff; but the court refused to so instruct the jury; to which refusal defendant, by his counsel, excepted. 55

And thereupon the court, addressing plaintiff's attorney, said: "I think we will have to advise the jury to find for the plaintiff. You draw up the verdict;" to which decision, finding, and remarks in the hearing of the jury defendant, by his counsel, then and there excepted.

And thereupon the court instructed the jury in words and figures following, to wit:

"GENTLEMEN OF THE JURY: There has been a long controversy between these parties about the possession of this property and the payment of the purchase-money. In certain agreements which have passed between them it has been considered very fully here and examined at great length. We have reached the conclusion that the defendant here did deliver the possession of the property to the plaintiff. There was a conveyance made, there is no dispute about that, and there is a controversy between them as to whether the defendant did in fact give the possession of the property to the plaintiff, The Slide & Spur Mine, here in Boulder county; and so it comes out, and so far as this branch of the litigation is concerned we conclude the plaintiff is entitled to the possession of the property. There is some further controversy about the payment of the purchase-money that was involved in another suit, but it stands in this way upon these papers in which there is no question of fact to be determined; but the parties have a right to a trial by jury, so it is submitted in this way."

To which instruction, in all that relates to the right of the plaintiff to recover and its right to a verdict, the said defendant, by his counsel, then and there excepted.

And thereupon the jury returned a verdict in the words and figures following, to wit:

"We, the jury, find for the plaintiff in this action, and that the plaintiff has title in fee simple in and to the premises described in the complaint in this action, and is entitled to the possession of the same."

And the court, addressing the jury, said: "That is the verdict which, by the direction of the court, is to be recorded in this action. We will enter it in this form."

To which ruling of the court the defendant, by his counsel, then and there excepted, both as to the finding of the court and as to the form of the verdict. 56

And afterwards and on the 30th day of June, 1890, the said defendant filed his motion for a new trial, which was in the words and figures following, to wit:

"Now comes the said defendant and moves the court to set aside the judgment and verdict in this cause and grant a new trial, for—

1st. There was no sufficient evidence to sustain the finding.

2nd. The court erred in refusing to instruct the jury to find for the defendant.

3d. Because the court erred in instructing the jury to find the issues for the plaintiff.

4th. The verdict is not in the form prescribed by law.

5th. There is no evidence to support the verdict.

6th. The answer introduced by the plaintiff as evidence as a whole and received as a whole must be taken and held to be true in all its statements of facts and in all the inferences the jury might draw from such facts, and such inferences are and were for the jury alone, & hence the court erred in taking the case from the jury as it did when it instructed the jury to find for the plaintiff.

7th. In the answer all the evidence of defendant in case No. 2322 was read or offered to be read to the jury, and the defendant was not only entitled to have the said evidence of the defendant read to the jury, but entitled also to all the inferences the jury might legally draw from such evidence as to the question at issue, viz: The right of the defendant, as agent of the former owners, to retain possession from the plaintiff and for the former owners under and by virtue of the contract set forth in the defendant's answer received in evidence.

8th. The verdict is otherwise irregular and informal.

9th. There is no evidence of the right of the plaintiff to own and hold real estate in this State.

(Signed) TELLER & ORAHOOD,
Att'ys for D'f't."

And afterwards and upon the 8th day of July, 1890, the court having heard said motion for new trial, the same was overruled; to which order upon the verdict and the overruling of said motion for a new trial and entry of judgment said defendant, by his counsel, then and there duly excepted.

And, forasmuch as the foregoing matters and things do not fully appear of record, the defendant presents this his bill of exceptions and asks that the same be signed, sealed, and delivered and made a part of the record herein; which is done accordingly
57 this 19th day of July, A. D. 1890.

By the court:

MOSES HALLETT, *Judge.*

Approved.
L. S. DIXON.

(Indorsed:) 2475. Circuit court U. S. The Slide and Spur Gold Mines, Limited, *vs.* J. Fenton Seymour. Bill of exceptions. Filed Jul- 19, 1890. William A. Willard, clerk.

And afterwards and on, to wit, the 13th day of August, A. D. 1890, came again the said defendant, by his attorney aforesaid, and filed in said court and in said cause his bond on writ of error to the Supreme Court of the United States; and the said bond is in words and figures as follows, to wit:

Bond on Writ of Error.

THE UNITED STATES OF AMERICA, }
District of Colorado. }

Know all men by these presents that I, J. Fenton Seymour, as principal, and Ellen R. Seymour — William G. Pell, as sureties, are held and firmly bound unto The Slide & Spur Gold Mines, Limited, a corporation, in the full and just sum of five thousand dollars, to be paid to the said The Slide & Spur Gold Mines, Limited; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this — day of July, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at the May term, A. D. 1890, of the circuit court of the United States for the district of Colorado, in a suit
58 pending in said court between The Slide & Spur Gold Mines (Limited), plaintiff, and J. Fenton Seymour, defendant, judgment was rendered against the said J. Fenton Seymour in ejectment for the recovery of a certain lode m'n'g property known as the Slide & Spur lodes, as patented by Gov. of the U. S., — having obtained a writ of error to reverse the judg't of said court and a citation directed to the said The Slide & Spur Gold Mines, Limited, citing and admonishing it to be and appear at a term of the Supreme Court of the United States to be held at Washington on the 2nd Monday of October next:

Now, the condition of the above obligation is such that if the said J. Fenton Seymour shall prosecute *said* his said writ of error to effect and answer all damages and costs, including damages for the detention of the property, just damages for delay, if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

J. FENTON SEYMOUR. [SEAL.]
ELLEN R. SEYMOUR. [SEAL.]
WM. G. PELL. [SEAL.]
M. F. LEECH. [SEAL.]
WM. WISE. [SEAL.]
JOHN W. BERKLEY. [SEAL.]

Approved Aug. 13th, '90.
MOSES HALLETT, *Judge.*

(Indorsed:) Gen. No., 2475. Circuit court of the United States, district of Colorado. The Slide and Spur Gold Mines, Limited, *vs.* J. Fenton Seymour. Bond on writ of error (supersedeas), $5,000.00. Filed this 13th day of Aug., A. D. 1890. William A. Willard, clerk, by F. W. Tupper, deputy clerk.

59 And afterwards and on, to wit, the 23d day of August, A. D. 1890, came again the said defendant, by his attorney

aforesaid, and filed in said court and in said cause his assignment of errors; and the said assignment of errors is in words and figures as follows, to wit:

Assignment of Errors.

In the Circuit Court of the United States, District of Colorado.

THE SLIDE AND SPUR GOLD MINES, LIMITED, Plaintiff,
vs.
J. FENTON SEYMOUR, Defendant.

Now comes the said defendant and says that in the record and proceedings herein there is manifest error in this, to wit:

(1st.) The court erred in refusing to instruct the jury that the evidence was not sufficient to warrant a verdict for plaintiff, and that the verdict of the jury should be for the defendant.

(2nd.) The court erred in instructing the jury to find for the plaintiff.

(3rd.) The court erred in giving the following instructions:

"GENTLEMEN OF THE JURY: There has been a long controversy between these parties about the relation of this property and the payment of the purchase-money. In certain agreements which have passed between them it has been considered very fully here and examined at great length. We have reached the conclusion that the defendant here did deliver the possession of the property to the plaintiff. There was a conveyance made, there is no dispute about that, and there is a controversy between them as to whether the defendant did in fact give the possession of the property to the plaintiff, *the* The Slide & Spur Mine, here in Boulder county; and so it comes out, and so far as this branch of the litigation is concerned we conclude the plaintiff is entitled to the possession of the property. There is some further controversy about the payment of the purchase-money that was involved in another suit, but it stands in this way upon these papers in which there is no question of fact to be determined; but, then, the parties have the right to a trial by jury, so it is submitted in this way."

60 (4th.) The court erred in taking the question as to the right of possession from the jury.

(5th.) The court erred in instructing the jury that plaintiff was entitled to recover, since by the complaint itself it was asserted that plaintiff was a corporation organized and existing under the laws of Great Britain and seized in fee of the premises, both of which allegations were denied by the answer, and the first denial was that the plaintiff never was authorized to do business within the State, and no proof whatever of any kind was offered as to its incorporation or right to do business.

(6th.) The court erred in instructing the jury to find for the plaintiff, because the answer of the defendant, which plaintiff offered as evidence, if taken at all, should be taken as a whole and considered by the jury, and the jury, not the court, could have found some statements therein true and could have rejected others and the court had no such province; and so, as to it, the statement of the answer showing that the parties named, together with the defendant, had at the time the suit was brought the right to the possession of the mine was binding upon the court and the verdict and judgment are unsupported by the evidence.

7th. The court erred in finding from the evidence and in instructing the jury to find pl'ff the owner in fee of the premises and in finding and instructing the jury to find that the pl'ff was entitled to the possession of the premises.

TELLER & ORAHOOD,
Att'ys for Dff't.

(Indorsed:) 2475. Circuit court. The Slide and Spur Gold Mines (Limited) *vs.* J. Fenton Seymour. Assignment of errors. Filed Aug. 23, 1890. William A. Willard, clerk. Teller & Orahood, attorneys for defendant.

61 And afterwards and on, to wit, the 4th day of September, A. D. 1890, came again the said defendant, by his attorneys aforesaid, and sued out of and under the seal of said court a writ of error to the Supreme Court of the United States; and the said writ of error and return thereto is hereto attached, to wit:

Writ of Error and Return.

62 Writ of error to — court U. S., district of Colorado.

THE UNITED STATES OF AMERICA.

[Vignette.]

UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

The President of the United States to the judge of the circuit court of the United States for the district of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, between The Slide & Spur Gold Mines, Limited, pl'ff, and J. Fenton Seymour, def't, a manifest error hath happened, to the great damage of the said J. Fenton Seymour, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2nd Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Seal United States Circuit Court, District of Colorado.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 13th day of September, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the 115th year.

WILLIAM A. WILLARD, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

Allowed by—
MOSES HALLETT, *Judge*.

63 [Endorsed:] Gen. No., 2475. Circuit court of the United States. J. Fenton Seymour, plaintiff in error, *vs.* The Slide and Spur Gold Mines, Limited. Writ of error to circuit court U. S., district of Colorado. Filed in circuit court of the U. S. this 13th day of Sept., A. D. 1890. William A. Willard, clerk, by F. W. Tupper, deputy clerk. Teller & Orahood, attorney- for plaintiff in error.

Return.

THE UNITED STATES OF AMERICA, } *ss*:
District of Colorado, }

In obedience to the command of the within writ, I herewith transmit to the honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Seal United States Circuit Court, District of Colorado.

Witness my hand and the seal of said circuit court, at Denver, in said district, this 10th day of October, 1890.

WILLIAM A. WILLARD, *Clerk*.

The defendant having served the writ of error by lodging a copy in the clerk's office for the plaintiff, and having given the security required in apt time, this writ therefore becomes a supersedeas.

WILLIAM A. WILLARD, *Clerk*.

64 And thereupon and on the same day, to wit, the 13th day of September, A. D. 1890, came again the said defendant, by his attorneys aforesaid, and sued — of said court a writ of citation to the Supreme Court of the United States; and the said citation and acceptance of service thereof is hereto attached, to wit:

Citation and Acceptance of Service.

65 Citation, U. S. — Court.

THE UNITED STATES OF AMERICA, }
District of Colorado. }

The United States of America to the Slide & Spur Gold Mines (Limited), Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington, D. C., on the 2nd Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Colorado, wherein J. Fenton Seymour is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Moses Hallett, judge of the circuit court of the United States for the district of Colorado, this 13th day of September, in the year of our Lord one thousand eight hundred and ninety.

MOSES HALLETT, *Judge.*

66 [Endorsed:] Gen. No., 2475. Circuit court of the United States, district of Colorado. J. Fenton Seymour, plaintiff in error, *vs.* The Slide and Spur Gold Mines, Limited, defendant in error. Citation. Filed in circuit court of the U. S. this 9th day of October, A. D. 1890. William A. Willard, clerk, by —— ——, deputy clerk. Teller & Orahood, attorneys for plaintiff in error.

Proof of Service.

THE UNITED STATES OF AMERICA, } *ss:*
District of Colorado. }

On this — day of ——, A. D. 18—, personally appeared —— —— before me, the subscriber, a clerk of the —— court of the United States for the district of Colorado, and makes oath that he delivered a true copy of the within citation to ——.

—— ——.

Sworn to and subscribed before me this — day of ——, A. D. 18—.

—— ——, *Clerk,*

By —— ——,

Deputy Clerk.

I hereby admit service of a copy of the within citation this 9th day of October, 1890.

L. S. DIXON,
Att'y for Def't in Error.

67 UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

I, William A. Willard, clerk of the circuit court of the United States for the district of Colorado, sitting at Denver, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of the record and proceedings heretofore filed and had and entered of record in said court in a certain cause lately in said court pending, wherein The Slide and Spur Gold Mines (Limited) was plaintiff and J. Fenton Seymour was defendant, as fully and completely as the same still remains on file or of record in my office.

Seal United States Circuit Court, District of Colorado.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this tenth day of October, A. D. 1890.

WILLIAM A. WILLARD, *Clerk.*

[Endorsed:] Circuit court of U. S., district of Colorado. J. Fenton Seymour, plaintiff in error, *vs.* The Slide & Spur Gold Mines (Limited), defendant in error. Transcript of record. Willard Teller, Harper M. Orahood, att'ys for pl. in error. Luther S. Dixon, att'y for def't in error.

Endorsed on cover: Case No. 14,287. Colorado C. C. U. S. No. 263. J. Fenton Seymour, plaintiff in error, *vs.* The Slide and Spur Gold Mines, Limited. Filed October 15, 1890.

Office Supreme Court U. S.
FILED.
JAN 13 1894
JAMES H. McKENNEY,
CLERK.

263

IN

The Supreme Court

OF THE

United States.

J. Fenton Seymour,
Plaintiff in Error,

vs.

The Slide and Spur Gold
Mines (Limited),
Defendant in Error.

STATEMENT OF FACTS.

& Brief for Plaintiff in Error.

WILLARD TELLER.
HARPER M. ORAHOOD.

C. J. KELLY, Printer, Denver.

IN

The Supreme Court

OF THE

United States.

J. FENTON SEYMOUR,
Plaintiff in Error,

vs.

THE SLIDE AND SPUR GOLD
MINES (LIMITED),
Defendant in Error.

Statement of Facts as Shown by the Record.

The action was ejectment to recover possession of certain lode mining property and lots on Gold Hill, Boulder County, Colorado.

Plaintiff averred ownership in fee and ouster by defendant, suit being brought October 18, 1889. The plaintiff alleged that it was a corporation organized and existing under the laws of Great Britain, and prayed recovery of the property. Defendant answered, denying· First, the incorporation of plaintiff; second, denied that plaintiff had even been authorized to do business under the laws of the State, within the State of Colorado; and, third, denied that plaintiff was ever at any time entitled to the possession of said property; fourth, by a special or second defense it was set forth in substance that certain negotiations were had in 1886 between the then owners of the property looking toward a sale by such owners, defendant acting as their agent, to the effect that the property was to be sold to a corporation in England, such corporation to be thereafter formed by one John Haldeman for the sum of £375,000 sterling, £85,000 of which was to be paid in cash and balance in stock of the company, Haldeman to pay the cash and hold an option on the property; but Haldeman, having failed to pay the £85,000, and having paid but £12,500 pounds, a new contract was made between Haldeman and defendant, acting as agent, on the 18th day of August, 1887, which contract, *inter alia*, provided that:

> "The said John Haldeman agrees to pay forthwith the sum of £10,000 in addition to the £12,500 already paid on account of the purchase money of the said mines, such sum of £10,000 to be paid through Wells, Fargo & Co. (who now hold the deeds of said property in escrow), and to be held by them and paid over to the said J. Fenton Seymour upon the titles of the said mines being registered in the name of The Slide and Spur Gold Mines, Limited, free from all charges and incumbrances; and the said J. Fenton Seymour hereby undertakes and agrees to register the titles as above, upon the said £10,000 being deposited with Wells, Fargo & Co.
>
> "The said J. Fenton Seymour hereby underdertakes and agrees to have the Slide mine worked

to its full capacity after the due and legal registration of the title to the said company, he further agrees that the returns from the said mine shall be cabled weekly to the said company in the form of cables sent herewith, it being understood and agreed that the money value of the first weekly return so cabled shall not be less than the sum of £200, and that each weekly return shall show a moderate increase over that sum; the said J. Fenton Seymour hereby undertakes and agrees to take the control of the management of the said property, *until* the payments hereinafter mentioned are completed, and it is understood and agreed *that he shall retain such control until the said payments are completed.*"

Then follows statement of the payments to be made by Haldeman, to wit, £55,000, in addition to that then deposited with Wells, Fargo & Co. within a time stated.

The answer further averred that The Slide and Spur Gold Mines, Limited, was a creation of John Haldeman; that he was at all times acting with and for the plaintiff company; that before the £10,000 was paid and before the deeds were registed, to wit, on September 6, 1887, this contract were laid before the company, and it took action thereon, and that at that time the name of grantee in deeds on deposit with Wells, Fargo & Co. was changed from Haldeman to the plaintiff. It then sets forth that afterward the defendant being in possession under the last mentioned contract, made another contract with the said Haldeman by which the company agreed to furnish money and defendant agreed to work the mine; this contract was made October 5, 1888, but in no respects altered the terms of that of August 18, 1887, as to defendant's right to retain possession till the £55,000 was paid. The answer further shows that neither said company, plaintiff or Haldeman ever paid the £55,000 in cash or paid any sum except the £10,000 mentioned above, and avers that the sole and only reason why the deeds to the company were registered or recorded was to enable the company to issue its stock, the agreement being that defendant should at all times retain the possession for the grantor till the purchase price was fully paid, and that the sole end and intention of the contract of October 5, 1888, was to induce the defendant to work the mine, he retaining possession under the contract of August 18, 1887.

To the second defense, plaintiff filed a replication, which admits by failing to deny the contract of August 18, 1887, but denies that Haldeman was then a director of the plaintiff; denies that the latter contract was made for the benefit of plaintiff, but admits that as between Haldeman and defendant, it may have been that registration of deeds was procured to enable plaintiff to issue its stock, and that *no* issue of stock could have been had except upon registry of deeds; admits by not denying that before registry of deeds the contract of August 18, 1887, was laid before the Board of Directors of plaintiff, but denies that Haldeman was then a director (see Record, pp. 16 and 17).

On the trial, plaintiff offered in evidence, and it was read, the entire answer of defendant, and also a deposition of defendant, taken in June, 1892, in a certain case pending in the United States Circuit Court in Chancery, it being a statutory proceeding brought by plaintiff against defendant to recover the possession of this same property, on the plaintiff's claim that defendant had kept it out of possession by threats and had wrongfully entered into the possession while plaintiff was temporarily absent. And this being all of plaintiff's testimony, the defendant asked for instruction to find for defendant, for that the evidence would not support a verdict for plaintiff, which instruction was refused, and the defendant excepted. The Court, thereupon announced that it would instruct the jury to find for the plaintiff, to which the defendant objected, and, upon the Court's instructing the jury to that effect, duly excepted, and the defendant brings the case to this Court.

BRIEF.

The errors assigned are as follows:

(1st.) The Court erred in refusing to instruct the jury that the evidence was not sufficient to warrant a verdict for plaintiff, and that the verdict of the jury should be for the defendant.

(2d.) The Court erred in instructing the jury to find for the plaintiff.

(3d.) The Court erred in giving the following instructions:

"Gentlemen of the Jury—There has been a long controversy between these parties about the relation of this property and the payment of the purchase money. In certain agreements which have passed between them it has been considered very fully here and examined at great length. We have reached the conclusion that the defendant here did deliver the possession of the property to the plaintiff. There was a conveyance made (there is no dispute about that) and there is a controversy between them as to whether the defendant did in fact give the possession of the property to the plaintiff, *the* The Slide and Spur Mine, here in Boulder County; and so it comes out, and, so far as this branch of the litigation is concerned, we conclude the plaintiff is entitled to the possession of the property. There is some further controversy about the payment of the purchase money that was involved in another suit, but it stands in this way upon these papers in which there is no question of fact to be determined; but, then, the parties have the right to a trial by jury, so it is submitted in this way."

60. (4th.) The Court erred in taking the question as to the right of possession from the jury.

(5th.) The Court erred in instructing the jury that plaintiff was entitled to recover, since by the complaint itself it was asserted that plaintiff was a corporation organized and existing under the laws of Great Britain and seized in fee of the premises, both of which allegations were denied by the answer, and the first denial was that the plaintiff never was authorized to do business within the State, and no proof whatever of any kind was offered as to its incorporation or right to do business.

(6th.) The Court erred in instructing the jury to find for the plaintiff, because the answer of the defendant, which plaintiff offered as evidence, if taken at all, should be taken as a whole and considered by the jury, and the jury, not the Court, could have found some statements therein true and could have rejected others, and the Court had no such province; and so, as to it, the statement of the answer showing that the parties named, together with the defendant, had at the time the suit was brought the right to the possession of the mine, was binding upon the Court, and the verdict and judgment are unsupported by the evidence.

(7th.) The Court erred in finding from the evidence and in instructing the jury to find plaintiff the owner in fee of the premises, and in finding and instructing the jury to find that the plaintiff was entitled to the possession of the premises.

These several assignments really raise but two questions, or, as incidental thereto, one other question, viz., did the Court err in refusing to instruct the jury to find for the defendant?

2. Did the Court err in instructing the jury to find for the plaintiff?

3. Did the Court err in not submitting the case to the jury?

Upon the first question we think the error of the Court is apparent when we look at the pleadings and give heed to the undisputed proposition recognized by all Courts in every case of this kind, viz., that the plaintiff in ejectment must always recover, if he recovers at all, on the strength of his own title and not on the weakness or want of title of the defendant. Every allegation material to the right of recovery denied by the defendant must be supported by proof. Nothing is or can be more essential to a recovery by a corporation, than its right to own, hold, occupy and possess the land sought to be recovered. The plaintiff alleges that it is a corporation organized and existing under the laws of Great Britain and a subject of Great Britain (Record, p. 1), and it nowhere alleges (except by inference from the facts that it alleges a seizin in fee), that plaintiff ever was entitled to own or possess real estate, even in Great Britain, much less is it alleged that it had ever complied with the laws of the State of Colorado upon compliance with which alone it could own or have the right to possess land in that State. Hence, it was and still is contended that plaintiff, by its complaint, showed no cause of action. This point was raised by demurrer to the complaint and was overruled, but under the Code of Colorado, that question is still open and may be raised at any time.

Code of Colo., Chap. 4, Sec. 55.

But, more than this, the right of the plaintiff to own or hold real estate or to do business in the State, was put in issue by defendant by specially denying that it was entitled to do business, or that plaintiff was ever seized in fee, or seized in any way of the said property mentioned in the complaint (Record, p. 6), and also by denying that plaintiff ever had been in possession or entitled to the possession; and, further, the answer to which a replication was filed by plaintiff set forth at length the facts out of which plaintiff's claim to title and possession arose, to wit, upon a delivery of deeds for a *special purpose* and *an entry* by *defendant* to hold *possession* for the real owners *until* the purchase money should be fully paid (Record, p. 9, where the contract is set forth, and p. 15, where the allegation of the answer is shown).

Now, on the trial, it will be seen by reference to the bill of exceptions, the plaintiff offered no evidence of any kind as to its corporate character, which was clearly put in issue by the allegation of the answer (see Record, p. 6).

The Constitution of the State of Colorado, Article XV., Section 10, says: "No foreign corporation shall do any business in this State without having *one* or more known places of business and an authorized agent or agents in the same upon whom process may be served."

By Section 499, Mills' Statutes of Colorado, it is said:

> "Foreign corporations shall, before they are authorized or permitted to do any business in this State, make and file a certificate signed by the President and Secretary of such corporation, duly

acknowledged, with the Secretary of State and in the office of the Recorder of Deeds of the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in the State, and an authorized agent in this State, residing at its principal place of business, upon whom process may be served. * * *

"And *no foreign or domestic corporation established or maintained in any way for pecuniary profit of its stockholders or members, shall purchase or hold real estate in this State except as provided for in this act.*"

This being the statute, the question arises under this statute and under the provisions of the Constitution of the State, the plaintiff in this case, having offered no evidence whatever, either as to its corporate character or as to any compliance or attempt at compliance with the laws relating to foreign corporations, was not the defendant entitled to the instructions asked?

It is true that this Court, in the case of Fritts vs. Palmer, 132 U. S., 282, held that a deed of property made by a party to a foreign corporation who had not complied with the statute was not void, so that the title still remained in the grantor, and so that he could give good title to a grantee subsequent to the deed to the corporation, but that holding is, we venture to say, by no means conclusive of the case at bar. In that case this Court said: "Precisely what is meant by the words in Section 260, 'except as provided for in this act,' is difficult to tell, since the act does not indicate any particular mode in which a foreign corporation may acquire real estate in Colorado. But, perhaps, the most reasonable interpretation of the law is that a foreign corporation shall not purchase or hold real estate in Colorado, for purposes of its business, until it first acquire in the mode prescribed by the local law the right to do business in the State." (*Id.*, 288.) It is true also that the Supreme Court of Colorado in the case of Utley *et al.* vs. The Clark G. Co., 4 Colo., 369, held on a plea in abatement, that a company who had not complied with this law might sue in an action "*de bonus asportatis*" for ore taken from its mine. But in that case the Court said:

> "Taking language in its ordinary acceptation, a corporation does business by the exercise of its power to contract, its power to acquire and hold property, real and mixed. * * * The failure therefore, of the company to comply with the terms of the statute, however it may affect its right to *hold* and enjoy the property, the subject of the trespass did not affect its capacity to sue. The plea was in abatement and *went only* to the power of the corporation to *sue*. *The plea, to have availed, if at all, should have been in bar of the action.*"

In that case there was no plea except the one in abatement, and hence the Court found *an* admission by defendant of plaintiff's ownership, and the defendants were thus without color of right and judgment was given for value of ore taken. But that case certainly shows by the language used that a plea in *bar* would probably be sustained in any case when the right of a foreign corporation plaintiff depended on the acqusition, holding and right of recovery of real estate, since to have such right it must be shown to be capable of "doing business" within the State, and this inference is rendered certain by the decision of the same Court in Tabor vs. Goss & P. Mfg. Co., 11 Colo., 429, in a case where suit was brought on an insurance policy issued by defendant in favor of a foreign corporation, the only business ever done or attempted to be done by such corporation being to get certain property insured and sue on the policy, and to the claim of defendant in that case that plaintiffs had not complied with the law, and so could not sue and recover on the policy, the Court (p. 249) says:

> "We cannot think that counsel is serious in urging this objection when the *only* business done related to this policy of insurance. There is nothing in the objection and if there was, the case of Utley *et al.* vs. Mining Co., 4 Colo., 369, cited, shows it to be a matter of defense to be pleaded in bar of the action."

In Colorado I. W. vs. Sierra G. Co., 15 Colo., 499, it was held that a single purchase of machinery by a foreign corporation was not "doing business" within the State so as to bring the case within the statute. These decisions are the only decisions of the Supreme Court of Colorado, and it is plain that the decision in the 11th Colorado referring to the decision in the 4th showed that the fact of non-compliance of the foreign corporation could be pleaded in *bar* of the action, and in a proper case would be a defense. It will be observed that the effect of all these decisions is to hold negatively that a title taken by a corporation not having complied with the law is not *ipso facto* void; that a mere naked trespasser, who pleads in abatement, cannot successfully defend against his wrongful acts by pleading that the corporation has not complied with the law, and, lastly, that one *act* of contracting about the matter out of which suit arose cannot be pleaded in abatement, but may be pleaded in bar. These cases are certainly not conclusive of this, since the facts are widely different. Here the suit is by a corporation, who claim ownership and right of possession to land and an ouster by defendant, and no recovery can be had except upon showing title and right of possession. The defendant in possession denies not only the right of the plaintiff to acquire title, but the right of possession even if it held title. If, as this Court, in Fritts vs. Palmer, said, "The reasonable interpretation of the statute is that such corporation shall not purchase or *hold real estate* for the purposes of *business* until it first acquires in the mode prescribed by local law the right to *do business* in the State," it was surely incumbent on plaintiff, when it sought not only to do business, but to dispossess a party who was in possession, to show it had the ability under the local statute both to do business and dispossess another, and hold possession as against that other. In the cases heretofore decided the Courts have simply held that a failure to comply with the local law did not *ipso facto* render its title void, and that as against an admitted *wrong-doer*, who carried off property thus held, this failure to comply with local law was not a defense, and especially when pleaded in abatement only. In those cases the corporation was held not to be defenseless when attacked by a wrong-doer, and that its alleged title could be interposed for its protection. In case at bar the corporation was allowed to assert all the rights it could ever have asserted, while admitting it had neither complied nor attempted to comply with the law. In the former cases it was on the defensive and allowed to repel the attack of wrong-doers; in this case it was allowed to not only assert its title and its right to do business, but to dispossess parties rightfully in possession and then to hold such possession. In other words, not only was the Constitution and the local statute set aside and rendered nugatory, but the "reasonable interpretation" put upon the statute by this Court was disregarded, and the exact opposite of such interpretation was given, and the statute thus interpreted made the rule of action by which verdict was ordered. Nothing is plainer from this record than that the corporate character of the defendant was at issue, and the right of plaintiff, if it was a corporation, to do business and dispossess the defendant. Nothing is plainer than that not a particle of proof was offered by the plaintiff upon either issue. We say this advisedly, for, since there was nothing in the proofs of any kind that bore on the question of compliance with the statute, in any degree, and the only proof as to corporate character is to be found in the answer of the defendant, which puts it in issue, and in the further answer of the defendant detailing the contracts for the purchase of the property by Haldeman, and the entry of the defendant into possession to hold possession for the owners until Haldeman's purchase was complete, and the record of the deeds for the proposed registry of stock—a mere recognition of a claim to be incorporated—when the title deeds were recorded.

The plaintiff, being under obligation to succeed, if succeed it could, on the strength of its right of possession at the time suit was *brought*, saw fit to admit the truth of the averment in defendant's answer (p. 15), "that his possession was given him for the purpose of holding for the vendors named in the deed, the deeds being *made, delivered and recorded only* to enable plaintiff to issue stock." While denying that the contract between Haldeman and the owners of the property was made for the company, it yet admits "it may have been made for the exact purposes defendant avers it was made, viz., to enable the company to issue stock, that, without the delivery of the deeds, as defendant avers, could not have been issued. The plaintiff also showed that it had, in June, 1889, brought suit on equitable side of the Circuit Court of the United States, District of Colorado, against defendant, under a statute set forth (p. 37, *et seq.*) to recover possession of this *same property*, and introduced the deposition of the defendant, taken in that case. Now, as this suit is shown, by the record in this case, to have been begun October 18, 1889 (record, p. 1), it is apparent that the plaintiff failed to recover possession in that equitable suit, or this suit at law for possession had never been brought. It is also apparent that defendant, in both the suit in equity and at law, defends on the same ground, viz., right of possession had under and because of a contract by which he entered on recording of deeds to hold possession until contract of purchase was completed (see record, pp. 15 and 39). We submit, in no view that can be taken of this evidence, with no proof whatever of a right to do business under the local statute, and with that question directly in issue, we were entitled to the instruction asked, that plaintiff had not made a case for a verdict.

II.

But aside from that, we certainly have the right, on part of defendant, to have the cause submitted to the jury, and not taken from it, and this is the second error we seek to discuss. We need spend no time in citation of cases in which this Court has stated the rule that should govern the Circuit Courts in such cases. We think we may state the rule to be that no case should be taken from the jury except it be one in which the Court (in case it had been left to a jury and a verdict found), would have felt bound to set aside as not warranted by the evidence. In all cases where the credibility of witnesses, the motives upon which parties acted, the end and object sought by parties to a contract, the reason why parties acted in a certain manner, the *bona fide* character of a claim and the like are all questions for a jury, and any case, the rightful determination of which can be said to rest in any essential degree on any question of this kind, is a case for the jury, and not for the Court.

Such being the law as we read the decisions of this Court, we call attention to the fact that the sole and only testimony of the plaintiff in support of its claim of right of possession, against a party actually in possession, was, first, the answer of the defendant in this case; and, second, the evidence given by defendant in a statutory proceeding, equitable in its nature, four months before the trial in this case, the object of both suits being the same, to wit, to recover possession of the mining property described in the complaint.

The first item of evidence offered, the defendant's answer, not only denied plaintiff's ability to acquire and hold property in Colorado, but set up specially the transactions between one Haldeman and defendant and between defendant and plaintiff, setting out the contents in *hæc verbu*, and averred that defendant's possession was by agreement between the former owners and the plaintiff, to be for benefit of both parties in this, to enable plaintiff to register its stock, and the defendant to hold possession for owners of the mine until purchase price was paid by Haldeman or the plaintiff; and there was nothing in the deposition of defendant, also offered, that contradicted it, and, if there was, then the jury were the ones to reconcile such contradiction. But, more than that, the replication of plaintiff, as we have already noticed, admits that Haldeman and defendant *may* have made just the contract that defendant in his answer alleged *he* had made with plaintiff (R., p. 17,) to wit, to allow deeds to be recorded, so plaintiff could issue stock. In other words, it practically admits, and certainly does not deny, the allegation of the defendant as to the purpose of deeding and registering of deeds, but does deny the rest of the contract as to defendant's right to retain possession until the purchase price was paid. It admits, then, the contract in part, and denies it in part, and says it was made with Haldeman, but *not* for the benefit of plaintiff, as defendant had alleged. Yet it is clear that on the registry of the deed plaintiff did issue its stock, and plaintiff had already admitted that issue of stock was legally impossible until the deeds had been registered. To issue stock is the first step that can be taken by a corporation in providing life blood for it, and the fact that no stock could be issued till after deed registered, and that stock was issued after registry, and the admission that the registry was made to enable the company to issue it, shows plainly that the company did receive the benefit of such agreement. Besides, the allegations of the answer were that plaintiff was at all times aware of *all* the dealings between Haldeman and defendant, and hence, when it took the deeds in pursuance of the contract between Haldeman and defendant Seymour it took such deeds subject to the entire contract and not subject to a part only, and when it thus by replication admits that a part of defendant's answer is true, it certainly was not competent for the Court to say the other part was untrue.

In addition to this it must be observed that while defendant in its answer sets *out* the contract under which and by express terms it was agreed that defendant should retain possession until payment of purchase money was completed, the plaintiff *nowhere* in its replication denies that the contract as set forth in the answer was made, or that what purports to be a copy of such contract was not a true copy, this contract appearing on pages 9 and 10 of the Record.

So, too, if we take the testimony afforded by deposition of defendant, it must be noticed that in the case in which that deposition was taken defendant was resisting an attempt on part of plaintiff in both that suit and this to oust him from the possession of the property, plaintiff claiming (R., p. 38,) that:

> "Defendant had kept complainant out of the possession * * * by threats, or by words or actions which have a natural tendency to excite fear or apprehension of charges, and that defendant had taken possession while complainant was temporarily absent therefrom."

And, as the deposition is confined to the matters alleged against defendant, it simply shows that at time of taking deposition defendant was in possession and was also a director of the plaintiff company, and that, in his capacity as director, he was in from December, 1888, while, as he also states in the deposition as well as in his answer, he went into possession personally (R., p. 39, and answer, p. 35) under the contract of August 18th, 1887. The deposition also showed that there had been no change in the possession from December, 1888, up to date of trial—June, 1889—and the deposition shows on its face that the question how, under what circumstances, and when defendant first entered into possession of the mine, was not inquired into. It was enough for the defense in that case to show that defendant's possession was known to and had been acquiesced in by plaintiff, to show that defendant had *not* taken possession while plaintiff was temporarily absent, while, as to the threats, etc., no proof whatever was given by anybody. It is clear, then, that the evidence afforded by this deposition, in June, did not, in the slightest degree, contradict defendant's answer four months later, but, if it did, it at once raised a question for the jury, and not for the Court alone. The deposition itself shows an assertion of an earlier personal possession than that of December, 1888. The answer avers what that possession was, why taken, when taken, and for what purpose, and the replication by plaintiff admits the truth of a good part of that answer. Now, on this, we say—on the facts shown in the answer, the replication and the deposition—the jury *could*, nay, ought to have found that the defendant's answer was true, and since the jury alone had the right to decide what credit they would give to the testimony. It should have been left to the jury.

Roach vs. Hulings, 16 Pet., 319.
District of Columbia vs. Ames, 107 U. S., 519.

The real question in the case was and is, what was the intent of parties, when the deeds mentioned in the answer were recorded? If the intention was, as defendant's answer avers, only to record, so that registry of stock could be had, and if intention was, as the answer avers, that defendant should hold possession for the former owners till, perchase money was paid, and if the evidence was sufficient to raise the *question* of *intent*, then must the Court submit the question to the jury.

U. S. vs. Quincy, 6 Pets., 466.
Lee vs. Lee, 8 Pet., 44.
Cornett vs. Williams, 20 Wall., 226-244.

So, too, the answer and the deposition both show a contract or proposition of October 5, 1888, under which defendant begun work on the mine in December, 1888, he, before that time, holding, under contract of August 18, 1887, and the averment of the answer is that the proposition of 1888 was intended in no wise to affect the defendant's status of possession for the owners till purchase money was paid, but that the only change was to set the work in motion, and this raised the question of intention of parties in respect to the October, 1888, contract, and upon that, too, we were entitled to go the jury.

Lastly, the ultimate question in this case was, whether plaintiff was entitled to the possession, at time suit was brought. Any fact showing it was not thus entitled was pertinent to the inquiry. Certain facts were set up in defendant's answer, showing defendant's possession to be rightful. Plaintiff put the answer in as proofs of its right. The replication was evidence against plaintiff, when it made admissions, from which a jury might lawfully infer any fact in favor of defendant or against the plaintiffs, and all inferences of this kind could be drawn only by the jury. The evidence offered showed defendant in possession from August, 1887, deed recorded September 6, 1887 (R., p. 11), and suit brought October 18, 1892, and a contract between Haldeman and the plaintiff September 10, 1887, by which it was agreed that Haldeman should *sell* property to the plaintiff, and providing, also, how the company (plaintiff) should pay for it (R., p. 12), and there is no denial of this in the replication, but simply a denial that Haldeman was, on the 10th of September, 1887, a director of the company (R., p. 17). The answer further shows that *not* until December, 1888, did the plaintiff exercise any control or have any of the proceeds of the mine (R., p. 35), and then made another contract, and the deposition of Seymour (R., p. 39.) also shows the same state of affairs. And from these facts alone might not the jury have legitimately inferred that defendant's answer as to the transaction of August 18, 1887, and the record of the deed, September 6, 1887, and the contract between Haldeman and the plaintiff, September 10, 1887, all showed defendant's averment that he was rightfully in possession, till purchase price was fully paid was correct. We submit that such an inference would not only be legitimate, but almost inevitable, from those facts and, if so, the Court could not lawfully deprive the defendant of the right to have those facts submitted to the jury. We submit further, that if the jury had thus been allowed to infer the truth of defendant's answer his defense would have been complete at law, and such inference would have been abundantly sustained by the evidence. Nor can there be any doubt that if defendant's answer as to the character of his possession and the purpose for which it was taken, and that it was taken with the consent of the plaintiff was true, his defense was complete, for since the question is one of the right of possession at time suit was brought, anything, either of a legal or equitable nature, that estops plaintiff from the right to demand possession is a defense at law, as this Court has repeatedly held.

Colgrove vs. Dickerson, 100 U. S., 578–582.
Baker vs. Humphrey, 101 U. S., 494.
Kirk vs. Hamilton, 102 U. S., 68–76–78.

We respectfully submit that on the record the case should have been submitted to the jury, and the judgment here should be reversed.

WILLARD TELLER.

HARPER M. ORAHOOD.

Office Supreme Court U. S.
FILED.
FEB 12 1894
JAMES H. McKENNEY,
CLERK.

In the Supreme Court

Of the United States.

J. FENTON SEYMOUR,
Plaintiff in Error,
vs.
THE SLIDE AND SPUR GOLD MINES, (LIMITED),
Defendant in Error.

263

BRIEF FOR DEFENDANT IN ERROR.

HARVEY RIDDELL,
Attorney for Defendant in Error.

In the Supreme Court

Of the United States.

J. FENTON SEYMOUR.
Plaintiff in Error,
vs.
THE SLIDE AND SPUR GOLD MINES, (LIMITED),
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

The substance of the pleadings is such as is stated in the brief of plaintiff in error (p. 1 to 4), except it will be noted that plaintiff below alleged it was a corporation organized and existing under the laws of *Great Britain*, (R. p. 1), while the answer denies (by an allegation that defendant has not and cannot obtain sufficient information upon which to base a belief) that plaintiff is a corporation organized and existing under the laws of the *United States*. This may be a clerical error, but, as it stands, is an admission of the allegation of the complaint.

It will also be observed that the answer alleges dealings and contracts between plaintiff and defendant, sufficient to fully establish the *de facto* corporate existence; in fact, quite sufficient to establish its legal existence, and certainly sufficient to estop defendant from disputing its existence.

Nor does the answer allege the incapacity of plaintiff to hold and deal with this real estate, so far as its corporate capacity is concerned, but much is alleged therein to show such capacity, or, at least, to estop defendant from claiming to the contrary.

Much also appears in the answer and replication as to right of possession, but in view of the alleged errors argued by plaintiff in error, it is not necessary to present these matters further.

The arguments urged upon errors assigned are that plaintiff has shown no capacity to hold real estate or to sue for and recover the same :

1. Because it is not alleged or shown that it has capacity to own or hold real estate, and

2. Because it is not shown that it has complied with the laws of Colorado with reference to foreign corporations doing business in this State.

First—Upon the first branch of the argument, the answer shows that it was contemplated that a corporation was to be formed to purchase these properties and that it was finally contracted that this particular corporation should be formed "for the purpose of purchasing, developing and working the said properties;" that shares of stock therein were to be issued and deposited in trust to secure the payment of purchase money ; that plaintiff had directors and that defendant dealt with the company and that a deed to these properties was executed to the company; that plaintiff in error had full knowledge of the exact affairs of the company and had repeated and long continued negotiations with it as a company authorized to purchase and hold these lands The proof shows (f. 50 *et seq*) that there was such a company and that defendant was a director and the managing director thereof and that he held possession for the company.

One dealing with a corporation is estopped to deny its corporate existence or its powers in the respect in which he dealt with it.

Besides, a failure to show capacity to hold real estate is not so strong an argument for plaintiff in error as would be a showing of incapacity to hold real estate, and this incapacity can be urged by the State alone and not by a private individual.

National Bank vs. *Matthews*, 98 U. S., 621.
Carlow vs. *Aultman Co.*, 28 Neb., 672 ;
Devlin on Deeds, § 127 ;
Am. Mort. Co. vs. *Tennille*, 87 Ga., 28 ;
Missouri Valley Land Co. vs. *Bushnell*, 11 Neb., 192 ;
Bank vs. *Land and Mining Co.*, Ky., (22 S. W., 881).

As stated by the Supreme Court of Missouri : "This doctrine applies to all classes of actions and in every variety of cases."

Conn. Mut. Life Ins. Co. vs. *Smith*, Mo., (22 S. W. 623).

There is also a presumption that corporations are qualified to take and hold lands.

People vs. *LaRue et. al.* 67 Cal. 526.

And whether they hold more than they are qualified to hold is for the State alone and not for private individuals to inquire.

Jones vs. *Habersham* 107 U. S. 174.

Second.—It is objected that it does not appear that the plaintiff corporation complied with the statutes of Colorado, so as to confer the right to hold lands in the State.

Fritts vs. *Palmer*, 132 U. S., 282, is conclusive of this question.

See also *Hickory Farm Oil Company* vs. *Buffalo, N. Y. & P. Ry. Co.*, 32 Federal, 22.

While *Fritts* vs. *Palmer* was directed to the question as to the failure to comply with certain requirements of the Colorado statutes, the reasoning is fully applicable to the questions presented in this case.

If, then, the question of its right to hold and sue for (*Utley* vs. *Clark* G. Co. 4, Colo., 369), real estate cannot be questioned by any other than the State, and especially so as to persons who have dealt with the corporation as to the particular subject matter; then, clearly, the question is limited to the right of possession as shown by other facts, and this brings us to the second heading of plaintiff in error's argument.

The substance of this argument is this: the answer set up certain facts designed to show that by reason of certain transactions between Ellen R. Seymour and William G. Pell of the one part, acting through and by defendant as their agent, and one Haldeman acting sometimes for himself and sometimes for the plaintiff company, of the other part, it was agreed that title was not to be actually passed to the plaintiff company until certain installments of purchase money had been paid and that defendant was to hold and did hold possession for said Ellen R. Seymour and Pell, and not for the plaintiff company, the said installments of purchase money not having been paid.

The replication squarely denied the allegations of the answer upon every material fact sought to be set up as such defense.

The whole question therefor, was as to right of possession, and the proof was directed mainly to show that the possession of defendant had been taken and held for the plaintiff.

The answer of defendant was introduced in evidence. That part of it which relates to corporate capacity was immaterial according to forgoing authorities, and that part which related to the manner and circumstances of defendant's possession was to show the defendant's present pretense.

There had theretofore been an action instituted wherein this plaintiff was also plaintiff and Seymour, the defendant, and one Green and Holt were defendants, under a statute set out in the record p. 37, called, in Colorado, the "Mine Jumping Statute," designed to furnish a summary remedy when possession had been taken of a mine by violence, intimidation or stealth; the purpose of which was to discourage such acts of violence and fraud, but the statute is designed, in the language thereof, "to extend only to the right of possession under the facts of the case in respect to the manner in which the possession was obtained, leaving the parties to their legal rights on all other questions as though no such writ had been issued," Code 1887 § 159.

It is apparent, therefore, that a judgment under this "Mine Jumping Statute," creates no presumption whatever as to the rights of the parties upon questions as to the general ownership and right of possession.

But certain facts were testified to by defendant in such action, pertinent to the present enquiry, and his deposition in that action was without objection read as evidence in this. From such evidence it appears that whatever may have been the character of his possession at the date of the various negotiations and transactions set forth in the answer, nevertheless in December 1888, long after said alleged transactions, he took possession, under a new arrangement, for the company. The witness himself draws this distinction sharply. He says, (R. p. 38): "I was in possession of the property personally before I worked on the property for the company." He states, (R. p. 39) that he took such possession for the company in December 1888.

"Q. Has the company remained in possession—the same possession you took—up to this time? A. It has.

Q. Has there been any change in respect to the possession? A. Not on my part.

Q. On anybody's part? A. No, sir." (R. p. 40).

And on p. 40 he further intensifies these facts.

It is true that that case related to the manner in which defendant obtained possession, but the fact clearly appears that the plaintiff company was in possession by defendant, its agent, from about the first of December 1888 to the giving of the testimony on June 18, 1889. This suit was begun on October 18, 1889, and there is not the slightest pretense made in the answer or in the evidence that any conditions had arisen in the meantime to change the character of this possession.

As the transactions stated in the answer all took place previous to June 18, 1889, they were available in that action. But they were not then asserted, and defendant cannot be allowed to enter into possession for Plaintiff and then on being called to account therefor, set up a defense predicated upon transactions occurring long antecedent.

In that action it was expressly admitted that possession had been taken from and for the company, but the illegal manner only of obtaining it was denied. Right of possession and actual possession for and by the plaintiff company having been shown from December 1888 to June 18, 1889, there is a presumption that such possession and right continues, unless evidence is produced to rebut this presumption, or at least make it doubtful.

1 *Greenleaf on Evidence* § § 41-42.
Brown vs. *King*, 5 Met. 173.
Bennett vs. *Conant*, 10 Gray. 163.

There is no question in the case as to weight of the evidence or credibility of the witnesses, because defendant was the only witness and his testimony disproved the allegations of his answer as to the character of his possession. The proof established a certain state of facts, as to which it was the duty of the Court to instruct the jury.

In the instructions of the Court, (3rd assignment of error R. p. 49.) reference was made to another controversy as to the payment of the purchase money for this property. It is permissable to say that such other controversy was the action of Ellen R. Seymour and William G. Pell, vs. this defendant in error to establish a vendor's lien, which case is now pending on appeal in this Court, being term number 284, wherein Seymour and Pell allege all the facts now in this action disputed, among other things the sale and transfer of the property to defendant in error and its possession thereof.

Defendant having entered as manager for plaintiff, cannot dispute plaintiff's title.

Doe d. Johnson vs. *Baytup*, 3 Ad. & E. 188, (30 E. C. L. 105);
Phelan vs. *Kelley*, 25 Wend, 395;
McGinn vs. *Shaeffer*, 7 Watts, 412.

Defendant's admission that plaintiff was owner is sufficient to support the action.

Jackson vs. *Dennison*, 4 Wend., 558;
Tyler on Eject. and Ad. Enj., 542.

It is submitted that the judgment should be affirmed.

HARVEY RIDDELL,
Attorney for Defendant in Error.